

**A COMPARATIVE STUDY OF FREEDOM OF EXPRESSION AND
RIGHT TO PRIVACY IN RELATION TO THE PRESS IN
MALAYSIA AND THE UNITED KINGDOM**

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ABSTRACT

The purpose of this study is to examine the protection of privacy in Malaysia against invasion by the press. The study argues that there ought to be a form of legal protection against invasion of privacy by the press. Protection of privacy should be viewed as complementary to a system protecting the exercise of free expression rather than opposing to such a system. The study establishes that the existence of institutional design within the constitutional framework creates a regimented restriction on freedom of expression *vis-à-vis* freedom of the press. The orientation of the restrictions, which is based on expediency and necessity, gives prominence to relativism. Arguably, this would thwart potential development and the course of human rights in Malaysia.

The study also examines the protection of privacy and freedom of expression in the United Kingdom. The development of privacy in the United Kingdom, which is moving towards accepting privacy as a right, could be used as a model in developing the law in Malaysia. Legal development on privacy is arguably tenable in Malaysia considering the fact that privacy-related interests are being protected under the common law principles as such in the United Kingdom. The study argues that the law should be in accordance with the local particularities on a contextual basis as against the transplantation of foreign principles. The study also argues that the approach of reflective equilibrium, whereby both universalism and relativism are taken into account, is appropriate in case of Malaysia considering the indigenous socio-political milieu.

The study concludes that in the absence of legislative commitment, privacy could be better protected under institutional mechanism by way of co-regulation under the province of Media Council or the Human Rights Commission. In view of this matter, the study will scrutinise the effectiveness of the institutions in providing protection to privacy.

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ABBREVIATIONS

AC	Appeal Cases
AIR	All India Reporter
AJCL	American Journal of Comparative Law
Ala. L. Rev	Alabama Law Review
All ER	All England Law Reports
ALR	Australian Law Reports
Am. J. Com. L.	American Journal of Comparative Law
Anglo-Am. LR	Anglo-American Law Review
APSR	The American Political Science Review
BHRC	Butterworth Human Rights Cases
BN	Barisan Nasional (National Front)
CA	Court of Appeal
Cal. LR	California Law Review
Ch	Official Law Reports
CJ	Chief Justice
CLJ	Cambridge Law Journal (UK)
CLJ	Current Law Journal (Malaysia)
CLP	Current Legal Problems
Cmnd.	Command paper
Col. LR	Columbia Law Review
Com. L	Communications Law
Cr. App. R.	Criminal Appeal Report
Crim. LR	Criminal Law Review
CRISPP	Critical Review of International Social and Political Philosophy
DBP	Dewan Bahasa dan Pustaka
De G. & Sm	De Gex & Smale's Chancery Reports
DLR	Dominion Law Report
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Report
EIPR	European Intellectual Property Review
EMLR	Entertainment and Media Law Reports
Ent. L.R.	Entertainment Law Review
EWCA Civ.	Court of Appeal (Civil Division)
EWHC	High Court (Administrative Court)
Fam.	Official Law Reports: Family Division
FCR	Family Court Reporter
FJ	Federal Court Judge
FSR	Fleet Street Reports
Geo. Was. L. Rev.	George Washington Law Review
HAKAM	National Human Rights Society (Malaysia)
Harv. HRJ	Harvard Human Rights Journal
Harv. LR	Harvard Law Review

HC	House of Commons
HL	House of Lords
HMSO	Her Majesty Stationary Office
HRA	Human Rights Act 1998
HRLR	Human Rights Law Report
ICCPR	International Covenant on Civil and Political Rights
ICLQ	International Comparative Law Quarterly
INSAF	Malaysian Bar Journal
IRLCT	International Review of Law Computers and Technology
ISA	Internal Security Act 1960
J of Law and Society	Journal of Law and Society
J.L.M. & P.	Journal of Media Law and Practice
JMCL	Journal of Malaysian and Comparative Law
Jo. LS	Journal of Legal Studies
Ky.	Kyshe Reports
Law and Phil	Law and Philosophy
Leg. Stud.	Legal Studies
LQR	Law Quarterly Review
L.R.	Law Reports
M & W	Meeson & Welsby's Exchequer Reports
Mac & G	M'Naghten & Gordan
Mal.L R	Malayan Law Review
MCA	Malaysian Chinese Association
MIC	Malaysian Indian Congress
Mich. LR	Michigan Law Review
MLJ	Malayan Law Journal
MLR	Modern Law Review
NILQ	Northern Ireland Law Quarterly
NLJ	New Law Journal
NYULR	New York University Law Reports
NZLR	New Zealand Law Reports
OJLS	Oxford Journal Legal Studies
OSA	Official Secret Act 1950
PAS	Parti Islam SeMalaysia
PC	Privy Council
PCC	Press Complaint Commission
Philos Public Aff	Philosophy & Public Affairs
PL	Public Law
PPA	Printing Presses and Publication Act 1984
QB	Law Reports: Queen's Bench Division
QBD	Queen's Bench Division
RPC	Reports of Patent Cases
SC	Supreme Court
SCJ	Supreme Court Judge
SCR	Supreme Court Reports (Canada)
St Tr	State Trials and Proceedings

SUHAKAM	National Human Rights Commission (Malaysia)
TLR	Times Law Reports
UDHR	Universal Declaration of Human Rights
U Pitt. LR	University Of Pittsburgh Law Review
UKHL	United Kingdom House of Lords
UMNO	United Malays National Organization
UNRISD	The United Nations Research Institute for Social Development
Web JCLI	Web Journal of Current Legal Issues
WLR	Weekly Law Reports
Yale LJ	Yale Law Journal

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CHAPTER 1

THE FRAMEWORK OF STUDY

1.0 THE SUBJECT OF STUDY

Communication of information through the media has been pervasive since the invention of the printing press. Historically, printing press was originated in China when it was first invented in 1041. However, the mechanical printing press as known today was invented in the West in 1450s by a German, Johann Gutenberg.¹ The new invention, which paved the way for rapid printing of written materials, also contributed to the proliferation of information during the Renaissance Europe. The exponential development and advancement in the technology of communication has led to the dissemination of information on a large scale and at rapid speed. One of the main players in this field is the press.

The formation of the press in the form of commercial organisations has changed the nature of information and news. Information and news have become part of commodities transacted in the market economy.² The commoditisation of information and news creates a competitive environment among the press to become the first to report news and disseminate information that could interest as many people as possible. The reward in so doing is lucrative particularly in the form of public subscriptions. In this relation, the role of the press as the public watchdog is at times, mixed with the interest of being a commercial organisation.

As commercial organisations the press needs to look after and protect their commercial and business interest. The commercial interest includes the interest of the shareholders particularly in case of the press that are formed as corporate bodies. Sometimes, the press manipulates news and information in the process of news reporting and news making for ulterior motives. An example of news making can be illustrated by the

¹ <http://encyclopedia.thefreedictionary.com/Printing%20press>

² See Curran, J. (1998) *Newspapers and the Press*. In Briggs, A and Cobley, P. (eds.) *The Media: An Introduction*. Harlow, 83.

scandal of the Daily Mirror in the UK when the newspaper published a faked photograph portraying the alleged abuse of prisoners by British soldiers during Iraq war in 2004.³

In order to meet the datelines, to deliver the latest news and information, the press either through their ignorance or with knowledge, encroach into freedom of others by invading their privacy. Naturally, the press relies on freedom of expression as the grandiose protection in legalising and defending the invasive act. The press defends their invasive act by invoking the public interest as a shield to vindicate them from being held liable. From the press point of view, an effort to introduce the law on privacy is an unwelcome development because it curtails the press freedom to publish. The law would then institutionalise protection on privacy, which is regarded as part of restrictions on the press.

On the other hand, the issue of privacy is not a matter of culture or nationality but of rights and needs. Arguably, it would not be acceptable to disclose all personal information of a person in the name of freedom of expression or freedom of the press. Ironically as privacy becomes a major concern in the era of modern information and communication technology, the threat on individual privacy by the media increases by the day. New technologies have created the potential for invasion of privacy on a scale that could scarcely have been imagined before.

For the public at large, the issue of privacy is not merely about the celebrities, public figures, rich and famous individuals. It is also about the lives of ordinary people in extraordinary situations, which to the press may fulfill the standard of newsworthiness. For example, some aids patients and victims of rape may want to be let alone. Understandably, due to their circumstances, they may not be willing to disclose their identity and their traumatic experience. Personal information from interesting stories or unfortunate events that spring from the lives of these people may become the headline news for the press to publish. On the other hand, individuals have the right to lead their lives without undue invasion. In this regard, the problem is that the law on privacy is

³ Milmo, D. and H. Carter, Mirror editor sacked over hoax. *Media Guardian*, 15 May 2004.
<http://media.guardian.co.uk/site/story/0,14173,1217377,00.html>

both a restricting mechanism clamping on freedom of expression, and also as a protection of dignity by not having personal information divulged unjustly.

By analogy, if reputation is acceptable as an interest worthy of legal protection under the law of defamation then why not privacy? Another intriguing question is to what extent privacy should be protected? This is pertinent because emphasis on privacy would inevitably causes chilling effect on freedom of expression. In order to answer the above questions, the study will discuss the tests of “offence” and “harm” to determine the extent of privacy. The study inclines to apply the “harm” test for reasons that will be discussed in chapter 3.

This study accepts the notion that freedom of expression and rights of privacy are widely recognised as fundamental human rights. The recognition is embedded in international and regional instruments, the International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights (ECHR) respectively. Though the importance of the rights is acknowledged under the banner of the United Nations, yet, the universality of the rights is a subject of division amongst several countries such as the UK and Malaysia. Such division appears due to the different emphasis on fundamental rights in both countries. For instance, the development of privacy as a human rights issue in recent years in the UK has seen a considerable concern for privacy, which is progressing towards accepting a right of privacy. Such development is not happening in Malaysia. This is perhaps due to the right of privacy being undervalued in the latter country. Malaysia appears to have a different emphasis on the nature of fundamental rights. Arguably, the prioritisation of the economic, social and cultural rights over the civil and political rights could be a contributing factor to the present state of privacy as being undervalued in Malaysia. Unlike Malaysia, the UK recognises both kind of rights as fundamental and accords equal treatment under the Human Rights Act 1998. Further discussion of this point will be pursued in Chapter 5.

In the context of Malaysia, the study seeks to establish that although Malaysia recognises personal liberties as constitutional rights, priority is given to the interests of the society rather than to the interests of the individual. This is in reference to the vast power

bestowed by the Constitution to the legislature in restricting the liberties under the provision of ‘necessity and expedient’.⁴ In pursuance of this, it is necessary to look at how the courts as the last bastion of liberty, exercise judicial activism to protect the rights. The locution of judicial activism in this thesis connotes the pro-active role of the judiciary in ensuring that rights and liberties are protected beyond the normal constraints. In Malaysian context, such activism can be illustrated when the courts are willing to expand the meaning of right to life under the constitution to encompass the quality of life that is to include privacy. On the other hand, judicial pragmatism refers to judicial commitment in bringing about the best result in the present case.⁵

A further issue that the study will focus on is the competing interests between freedom of expression and privacy. The lack of clarity on privacy is one of the factors that cause a formidable clash between both interests: privacy and freedom of expression. The clash is unavoidable since the purpose of protecting privacy is to retain personal information. On the contrary, the crux of freedom of expression is to disclose information. In this regard, the clash between freedom of expression and privacy arises out of the desirability to protect privacy while ensuring that freedom of expression is adequately safeguarded. There is a vexed question as to which should prevail. Which is more important between the protection of free and unfettered press in exercising freedom of expression and the individual right to privacy?

It is with this interest in mind that the underlying theme of the study evolves around the proclamation that privacy can be better protected and freedom of expression can be adequately safeguarded. However, the development must be in a contextual basis, sensitive to the relevant local particularities.

1.1 THE SCOPE AND AIM OF STUDY

The scope of the study is confined to freedom of expression and privacy in relation to the print press as suggested by the title. The locution of freedom of expression in the study connotes similar expression as freedom of speech. Although the short title of section 12

⁴ Article 10 (2) (a) of the Malaysian Constitution.

⁵ Posner, R. Pragmatic Adjudication. (1996) 18 *Cardozo L. Rev.* 1.

of the UK Human Rights Act 1998 uses 'Freedom of expression', Article 10 of the Malaysian constitution, however, adopts 'Freedom of speech'; the writer argues that there is no real distinction as to the meaning.⁶ Both locutions are used interchangeably in the study.

In relation to this, freedom of expression is to include freedom of the press. Freedom of expression, which is the thrust of press freedom, underpins the role of the press in a democratic society. Thus, freedom of the press is an institutionalised right to freedom of expression.⁷ The word 'press' in this study includes newspapers, periodicals and magazines. According to section 2 of Malaysian Printing Presses and Publication Act 1984 (PPA) newspaper means:

Any publication containing news, intelligence, reports of occurrences or any remarks, observations or comments, in relation to such news, intelligence or occurrences, or to any other matter of public interest, or any magazine, comic or other forms of periodical printed in any language for sale or free distribution at regular or irregular intervals, but does not include any publication published by or for the Federal or any State Government or the Government of Singapore.

Besides the conventional print press, an on-line press exists as a result of technological advancement in the area of information and communication. The preservation of privacy has grown more difficult and demanding, as society has to face the challenge of increasingly complex and intrusive technological advances. The existence of on-line press exacerbates the complexity of privacy issue. This type of press exists in the form of an extended version of the conventional print press or as a new version of press. Examples for the Malaysian extended versions are *Utusan* On-line,⁸ *The Star* On-line,⁹ and *Berita Harian* On-line¹⁰, whereas the UK versions are Guardian Unlimited,¹¹ The Independent On-line Edition,¹² and Times On-line.¹³ In addition, *Malaysiakini.com* is an

⁶ Barendt, E. (1985) *Freedom of Speech*. Oxford, 38.

⁷ Nash, C. Freedom of the Press in Australia. <http://democratic.audit.am.edu.au/nashpaper.pdf>.

⁸ <http://www.utusan.com.my/>

⁹ <http://www.thestar.com.my/>

¹⁰ <http://www.bharian.com.my/>

¹¹ <http://www.guardian.co.uk/>

¹² <http://www.independent.co.uk/>

¹³ <http://www.timesonline.co.uk/>

example of a new edition of on-line press in Malaysia that has no printed version. However, there is a legal conundrum with regard to the on-line press regulation. The absence of standardisation of rules and regulations in this area could raise a question of conflict of laws. For instance, unlike the UK, Malaysia has no data protection law to protect personal data. Thus, certain private information or personal data, such as in *Campbell v MGN*,¹⁴ is unprotected and could be published in Malaysia. As far as Malaysia is concerned, the meaning of press is governed by section 2 of the PPA, which may not cover the on-line press.

Privacy on the other hand is an elusive concept. Privacy is difficult to define because its meaning varies widely according to context. But the study vehemently argues that the importance of privacy is worth legal protection. Since the study focuses on the invasion of privacy by the press through publication of personal information, the scope of privacy is, thus, confined to informational privacy. This is not to suggest that the concept of privacy can be sufficiently clarified based on this aspect of privacy alone. Further deliberation on privacy will be made in chapter 4 of the study.

This study aims to reform and develop the law on protection of privacy against the invasion of the press in Malaysia. The law should be in tandem with the widely recognized protection such as under the International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights (ECHR), yet sensitive to the local conditions. The study argues that though Malaysia is not obliged to apply the ECHR, the positive obligation under the ECHR with regard to freedom of expression and privacy could be emulated by Malaysia. This argument finds its justification in the constitutional guarantee on freedom of expression as the right of the Malaysian citizens. Thus, the commitment to uphold the right, which is strong under the ECHR, should commensurate the proclamation of the right as a fundamental liberty in the Malaysian Constitution. In order to achieve this, the study will first analyse the state of protection of freedom of expression and privacy under the UK and Malaysian law. Secondly, the study will examine the intriguing issue of competing interests between freedom of expression and privacy in the UK and Malaysia. The study seeks to establish the fact that the

¹⁴ [2003] QB 633.

protection of privacy is piecemeal and incomplete in contrast with the constitutional protection of freedom of expression particularly in Malaysia.

In addition, the study will also analyse the application of techniques to accommodate the competing approaches in order to determine the issue of competing interests. The study seeks to defend the view that general balancing is unsatisfactory to resolve the issue of conflicting fundamental rights between freedom of expression and privacy. It also assesses the effectiveness of self-regulation in protecting right of privacy against the invasive act of the press. Last but not least, the study also examines the suitability of applying self-regulation in relation to the press, as practice in the UK, a country of different legal ambience.

1.1.1 CONSTRAINT AND DIFFICULTY

The scarcity of materials in terms of academic discussions and debates on privacy in Malaysia is the main difficulty encountered by the writer. This is established through library research based on catalogue and web-surfing on the internet by searching under the phrase “right of privacy” and “privacy” up to date. Research through Malaysian legal reports, The Malayan Law Journal and The Current Law Journal, found only one case *Public Prosecutor v Haji Kassim*,¹⁵ where invasion of privacy was mentioned in the context of Article 5 (1) of the Federal Constitution. Unfortunately, the court did not deliberate on the point because the real issue was admissibility of evidence. Moreover, discussion on privacy by local writers (Malaysian) is either summarised or included as a peripheral issue.

The writer finds that most of the writings on privacy in Malaysia are related to the proposed personal data protection law. The introduction of such law in the near future would undoubtedly change the landscape of Malaysian law whereby protection of informational privacy becomes part of the features of the law. However, the question as to what extent it will protect freedom of the press and privacy is still vague as the law is

¹⁵ [1971] 2 MLJ 114.

still in its preliminary stage. Therefore, discussion on privacy in Malaysia in this study could be considered as a preliminary work for a future researcher in this area.

To the knowledge of the writer there is no study on right of privacy in Malaysia that has been conducted before. Neither has there been any comparative study being done on this subject up to date. Nevertheless, there is a recent book on 'Privacy and Data Protection: A Comparative Analysis with Special Reference to the Malaysian Proposed Law' by Munir and Yasin (2002).¹⁶ The book however does not present a comparative study on the subject of freedom of the press and privacy. The main subject of the writing is on data protection law, where privacy in the Malaysian context is discussed in general.

The fact that there is lack of discussion on privacy in Malaysia contributes to the scarcity of materials on the subject. This is one of the reasons that motivate the writer to embark on this study. Considering that right of privacy in Malaysia is underdeveloped, the study then is conducted based on a comparative approach. The next discussion will focus on the rationale and appropriateness of the approach in relation to the study.

1.2 METHODOLOGY

1.2.1 COMPARATIVE ANALYSIS

The study adopts a comparative analysis as the methodological approach. This method is applied because the study relates to fundamental rights and it seeks to reform and develop law involving such rights. Moreover, the method is a useful tool for law reform.¹⁷ In this context, Manning contends that a comparative analysis is necessary in order to avoid mistakes.¹⁸ He also argues that the experience of courts in another country is useful in case of human rights and fundamental freedom.

¹⁶ Munir, A. B. and Yasin, S. H. (2002) *Privacy and Data Protection: A Comparative Analysis with Special Reference to the Malaysian Proposed Law*. Malaysia, Sweet and Maxwell.

¹⁷ Kahn-Freund, O. On Uses and Misuses of Comparative Law. (1974) 37 *MLR* 1, 2.

¹⁸ Manning, M. (1983) *Rights, Freedom and the Courts: A Practical Analysis of the Constitution Act 1982*. Toronto, 12.

This study relies on the approach proposed by Zweigert and Kotz.¹⁹ They suggest that when there is a specific comparative problem that the study is devoted to, the author:

... first lays out the essentials of the relevant foreign law...and then uses this material as a basis for critical comparison, ending up with conclusion about proper policy for the law to adopt, which may involve a reinterpretation of his own system.²⁰

Instead of presenting a comparative analysis on relevant issues in each chapter,²¹ the study analyses the issues in each respective jurisdiction, Malaysia and the UK, and offers separate comparative analysis at the later stage. This is to enable the lay readers to get familiar with and for better understanding on the issues and its development in the respective jurisdictions. Moreover, the aim of the study is not merely to find similarities and differences of practices and laws of different jurisdictions but to reform and develop law on the subject that is underdeveloped in Malaysia. Therefore, the writer views that by laying the backdrop of the practices, issues and development on the subject in one country would help to achieve the projected aim. Nevertheless, the writer will highlight some important points in due course, as the discussion progresses, particularly on the similarities and differences between the two jurisdictions in the respective chapters.

The approach is considered appropriate as the subject of the study relates to human rights.²² This is because it enlightens the law at the national level by relaxing a fixed dogma and complacency. It helps to develop principles consistent with the recognised international standard in pursuing a unitary sense of justice. The benefit of this approach is that it allows the procurement of knowledge²³ of another legal system for the purpose of law reform in one's own system. The comparative approach can lead to the identification of gaps in knowledge and may point to possible directions that could be followed. It also helps to sharpen the focus of analysis of the subject under study by suggesting new perspectives.

¹⁹ Zweigert, K and Kotz, H. (1998) *Introduction to Comparative Law*. Translated by Weir, T. Oxford, Clarendon Press.

²⁰ Ibid, 6.

²¹ Reitz, J.C. How to Do Comparative Law. (1998) 46 *AJCL* 617, 634.

²² Webb, A. Comparative Analysis of Data Protection Laws in Australia and Germany. (2003) 2 *JILT*. <http://elj.warwick.ac.uk/jilt/03-2/webb.html>

²³ Sacco, R. Legal Formants: A Dynamic Approach to Comparative Law. (1991) 39 *AJCL* 1, 5.

Furthermore, comparative approach is a catalyst for developing ideas and solution. It is an inspiring mechanism for legal transformation that takes into account the differences in socio-economic and politic-cultural of respective jurisdictions. It recreates the legal landscape by avoiding transplantation. This is one of the problems envisage in a comparative approach which the writer focuses on next.

The writer is aware that there are problems using comparative approach especially when it involves a recommendation to introduce a new law modeling on a foreign law. The fact that a comparative approach has to deal with a foreign law does not necessarily mean that transplantation of foreign laws and principles is the appropriate way. To apply a foreign model developed to suit a particular social, political and cultural condition of one country, as an instrument of social or cultural change is inappropriate.²⁴ Thus, transplantation is inappropriate in a country that does not subscribe to a peculiar social and political structure (Kahn-Freund, 1974). In this context, Zweigert and Kotz caution that effort to adopt a foreign solution must answer the question whether it will work in the country that adopts it.²⁵ Although foreign laws and principles may be appealing, it will be worthless if it could not be practically applied. Nevertheless, transplantation could offer a practical benefit for the purpose of standardisation of law particularly in the area of business and commerce under the international trade.

On the other hand, the application of foreign principles that suggest a solution to a problem should not be rejected on the ground that it is foreign and therefore unacceptable.²⁶ Even though the goal is not to unify the individuality of a legal system, nonetheless, it provides an avenue for reasons and rationales.

In addition, Beer cautions the problems confronting comparative studies where there is a tendency toward legal chauvinism and cultural insularism.²⁷ According to Beer, legal chauvinism represents a belief that a particular legal system constitutes the best general model for the world in terms of justice, rationality, efficiency, sophistication and

²⁴ Kahn-Freund, n. 15, 5.

²⁵ Zweigert, n. 17, 17.

²⁶ *ibid.*

²⁷ Beer, L.W. (1984) *Freedom of Expression in Japan*. Tokyo, 21.

adherence to a given constitutional ideology. This attitude is prevalent during the colonialist dominance.

Unfortunately, a similar attitude is subtly emerging today whereby Western legalism through democracy and fundamental freedom is being exported to other developing and third world countries. The fight against terrorism intensifies the propagation of democracy to other countries such as Afghanistan, Iraq and other middle-eastern countries. Such act is not well received by other sovereign countries such as Malaysia. It is perceived as a form of cultural imperialism since the propagation of democracy is from the lenses of Western's liberal philosophy point of view. In this regard, comparative approach is pertinent in order to establish whether a dichotomy of Western and Eastern perceptions on fundamental rights has any coherent foundation.

On the other hand, cultural insularism or relativism relates to a conviction that a resolution of a legal problem must be in accordance with local particularities without reference to outside experiences and principles.²⁸ The writer argues that this will only deter the development of domestic legal principles, particularly in dealing with the complexity of legal problems at international level. The insensitivity of legal chauvinism or universalism towards local particularities and the uncompromising aspect of relativism require intermediate approach that could take into account both universalism and relativism.²⁹ This approach, which the writer subscribes, is based on reflective equilibrium by reference to John Rawls.³⁰ The approach promotes consideration of all terms without privileging either universalism or relativism in the process of determination.

This leads to the next discussion on the application of foreign laws and principles, particularly the English law in Malaysia in the context of relativism.

²⁸ Beer, op. cit., supra, 21-3.

²⁹ See Mullender, R. Human Rights: Universalism and Cultural Relativism. (2003) 6 *CRISPP* 70.

³⁰ Rawls, J. (1971) *A Theory of Justice*. Oxford, 48.

1.3 THE RECEPTION AND APPLICATION OF ENGLISH COMMON LAW IN MALAYSIA

1.3.1 HISTORICAL PERSPECTIVE

Malaysia is a developing country, which gained her independence from the British in 1957. There is a historical connection between Malaysia and the UK in relation to the legal system. To forge a better understanding of the relation, it is necessary to look at the historical perspective.

Beginning from 1511 until the independence, the Peninsular of Malaya (Malaysia before independence) was under four different occupations. The occupations by the Portuguese, Dutch and Japanese had no impact on local rules and regulations compared to the British. The British influence started when Francis Light landed on Penang soil, a state under the rule of Kedah Sultanate. Later, Penang was ceded to the British through the East India Company. At this stage, the English law applicable to the British subjects influenced the administration of Penang. The Treaty of Bangkok formalised the British rule over Penang soil in 1826 between Siam and Britain. The introduction of English law in Penang was made possible through the First Royal Charter of Justice in 1807. The English law was then applied to the British and non-British subjects. In this context, the Privy Council in *Yeap Cheah Neo v Ong Cheng Neo*³¹ said that:

It was really immaterial to consider whether the island should be regarded as a ceded or newly settled territory for there is no trace of any laws having been established there before it was acquired by the East India Company. In either view the Law of England must be taken to be the governing law, so far as it is applicable to the circumstances of the place and modified in its application by these circumstances.³²

The application of English law was extended to the Straits Settlement, comprised of Penang, Malacca and Singapore, through the Second Royal Charter of Justice in 1826. The application of English law to the Federated Malay States in Peninsular Malaya was formalised by the introduction of the Civil Law Enactment in 1937. Section 2 (1) of the Enactment provides for the application of common law and equity ‘...as administered in

³¹ L.R. 6 PC 381.

³² Ibid, 393.

England at the commencement of this Enactment...shall be in force in the Federated Malay States...' The Enactment was amended in 1956 to enable its application to the whole states in the Federation of Malaya.

1.3.2 THE INTERPRETATION OF SECTION 3 CIVIL LAW ACT 1956

Currently, the application of the English law in Malaysia is governed by the Civil Law Act 1956 (Revised 1972). Section 3(1) of the Civil Law Act 1956 provides:

Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall –

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956;

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

The incorporation of the common law of England enables the courts in Malaysia to apply the law subject to two important conditions. First, only in so far as the circumstances permit and second, save where no provision has been made by statute law. The provision permits the acceptance of the common law of England in Malaysia subject to the qualification that it may be lawfully modified in the future by any written law.³³ In this regard, Wu Min Aun argues that the proviso of local circumstances is 'sensible and essential given the cosmopolitan nature of Malaysian society.'³⁴ It enables the courts to insulate English principles that are incompatible socially and culturally with local society. Maxwell CJ acknowledges this in *Chou Choon Neoh v Spottiswoode*³⁵ when the judge noted that in case of marriage and divorce for instance, it would be 'impossible to apply our law to Mohammedans, Hindoos, and Buddhists without the most absurd and intolerable consequences.'³⁶

³³ *Fusing Construction Sdn Bhd v EON Finance Bhd & Ors* [2000] 3 MLJ 95.

³⁴ Wu, M. A. (1999) *The Malaysian Legal System*. Kuala Lumpur, 105.

³⁵ (1869) 1 Ky 216.

³⁶ *Ibid*, 221.

This background serves as a basis for the study to argue that the application of foreign laws needs to be insulated by local conditions. On the other hand, reliance on local conditions should not be an excuse to refuse the universality nature of certain foreign laws particularly in relation to human rights.

Section 3 (1) of the Civil Law Act 1956 is to be interpreted together with Article 160 (2) of the Malaysia Constitution or *vice versa*. Article 160 (2) provides *inter alia*:

“Law” includes written law, the common law in so far as it is in operation in the Federation, or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

This definition only authorizes the reception of common law ‘... in so far as it is in operation in the Federation ...’. The Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*³⁷ ruled that if Article 160 (2) is not interpreted together with section 3 (1), it would render the section otiose as far as the modification of the common law is concerned in the future.

The approach of Malaysian courts to the development of common law is to be found in the judgment of Hashim Yeop Sani CJ in the Supreme Court case of *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor*.³⁸ In this case the court refused to follow the question of public policy in considering illegality of contract under the common law since the courts in this country are bound by the statutory provisions of the Contracts Act 1950. The judge said:

Section 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law in England.³⁹

Thus, the application of the common law of England after the cut-off date is within the discretionary power of the courts on the basis of persuasive authority. This is further

³⁷ [2004] 2 MLJ 257, 265.

³⁸ [1990] 1 MLJ 356.

³⁹ *Ibid*, 361.

illustrated by the case of *Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee & Ors.*⁴⁰ In this case the Court of Appeal disagreed with the application of section 3 of the Civil Law Act 1956 by the High Court. The court overruled the High Court's decision in refusing the principle in an English case *AC Billings & Sons Ltd v Riden*⁴¹ on the ground that it was a case decided after the coming into force of the Civil Law Act 1956. The court found that the High Court overlooked the decision of the Federal Court in *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors*⁴² that applied *AC Billings* case. This decision was binding on the court under the doctrine of precedent.

The above cases show that the Malaysian legal system is receptive towards the application of foreign principles in developing the system especially in the area where there is no legal provision. Raja Azlan Shah FJ observed that 'We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.'⁴³ It has been noted that comparative law has played an important part in the progress of the Malaysian legal system through the process of reformation and development. Thus, it is safe to say that importation of outside laws is being practiced but only if it passes the requirement of local circumstances. Arguably, this requirement is very subjective. It is for Parliament to change the law if it deems the circumstances justify such change.

Nevertheless, any changes should be in accordance with the Constitution. In Malaysia, Parliament derives its legislative powers from the Constitution.⁴⁴ Article 4 (1) of the Constitution proclaims that the supreme law in Malaysia is the Constitution. Any law passed by Parliament, which is inconsistent with the Constitution, is void to the extent of the inconsistency. Faruqi argues that the principle of constitutional supremacy in Malaysia is more notional than real.⁴⁵ This is because of the reluctance of the courts to invalidate legislation on the ground of unconstitutionality. The attitude is apparent, for

⁴⁰ [2003] 1 MLJ 273.

⁴¹ [1958] AC 240.

⁴² [1984] 1 MLJ 283.

⁴³ *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, 189.

⁴⁴ Article 66 of the Federal Constitution.

⁴⁵ Faruqi, S. Liberal enough to give life to the law. *The Star*, 2nd September 2001, 40.

instance, in *AG v Chioh Thiam Guan*⁴⁶ the court ruled that if Parliament deems it necessary that the death penalty should be mandatory it is not within the province of the court to adjudicate upon the wisdom of such a law. The court said that 'The law may be harsh but the role of the courts is only to administer the law as it stands.' On the contrary, in the UK Parliament is sovereign. The sovereignty of Parliament means that it has an absolute power to legislate on any matters.⁴⁷ The courts are under a duty to apply the legislation passed by Parliament and could not invalidate an Act of Parliament. This position is reiterated by Lord Reid in *Madzimbamuto v Lardner-Burke*,⁴⁸ a case concerned the declaration of independence by the Rhodesian government from the UK Parliament to legislate for Rhodesia.

1.4 THE STRUCTURE OF STUDY

The study is organised into eight chapters. Chapter 1 introduces the issues that the writer seeks to pursue. It also rationalises the aim and objectives of the study, which is to develop and reform the law on freedom of expression and privacy in Malaysia. The meaning and scope of the study as suggested by the title is dealt with in this chapter. To give a sense of clear direction, the study is centered on the theme that privacy can be better protected and freedom of expression can be adequately safeguarded yet development must be sensitive to the local particularities. This chapter also justifies the method of comparative approach adopted by the study. It explains the benefits and usefulness of the approach in relation to the subject matter of the study. It also describes the relationship between the Malaysian legal system and the UK from historical perspective and at present. This provides the background in order to understand and discern the similarities and differences in the subjects of the study relating to the practice of freedom of expression and privacy in the UK and Malaysia.

Chapter 2 presents the state of freedom of expression in the UK. In this chapter, the practice of free speech and expression in the UK is critically examined. The chapter begins with the rationales and justifications for freedom of expression. This is necessary

⁴⁶ [1983] 1 MLJ 51:52. See also *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, 188.

⁴⁷ Bradley, A.W. and Ewing, K. D. (1998) *Constitutional Law and Administrative Law*. London, 58.

⁴⁸ [1969] 1 AC 645, 723.

in view of the fact that freedom of expression is vital in a democratic society. It also investigates the protection and restrictions on freedom of expression before and after the introduction of the Human Rights Act 1998. It seeks to establish whether there exists a form of hierarchical rights that makes freedom of expression more important than privacy. Though there is no such form of rights, the study seeks to reveal that strong emphasis is given to the right based on judicial and extra-judicial pronouncements. The chapter also examines freedom of the press and assesses the practice of a self-regulatory system. In addition it also investigates the influence of the European Convention on Human Rights in relation to the practice of freedom of expression at the national level.

Chapter 3 examines the state of freedom of expression in Malaysia. It discusses the meaning and scope of freedom of expression under the constitution. This is to lay a background for further discussion on the protection and restrictions of the right. It seeks to reveal that although freedom of expression is a constitutional right, wide parameter of limitation impinges on its practice. Emphasis on the well being of the nation allows wide interpretation of restrictions, which at times is used for ulterior interest such as to maintain political power. It also examines the approach by the judiciary in protecting the fundamental right particularly in the interpretation of the constitutional constraints. The chapter also focuses on the freedom of the press. Though there is no specific constitutional protection of press freedom, discussion is offered on the provision of freedom of speech. The chapter analyses the impact of several restrictive laws on the exercise of press freedom in Malaysia. It also investigates the influence of the executive in the interpretation and application of the laws. It reveals that the press is heavily regulated and constrained at two stages: formation and operation.

Chapter 4 continues the approach as adopted in Chapter 2 whilst focusing on the state of privacy in the UK. The chapter examines the protection of privacy before and after the Human Rights Act 1998. The incorporation of the Convention rights, which include the protection of privacy, leads to incremental development for protection of privacy. Though the Act does not provide horizontal protection in clear terms, there is a constructive development moving toward accepting privacy under the existing legal

framework. This chapter also analyses whether the law on breach of confidence is a sufficient framework to accommodate privacy. It also examines the invasive act of the press, which is a contributing factor toward the development of privacy law in the UK. This chapter investigates the influence of the European Convention on Human Rights particularly on right of privacy. The chapter also reveals that the incorporation of Convention rights has changed the legal landscape of the UK law on human rights.

Chapter 5 focuses on the state of privacy in Malaysia. There is no specific provision on right of privacy in the constitution. In relation to this, the chapter analyses the constitutional provision in Article 5, which provides for right of life. The application of purposive approach by the courts will enable the inclusion of privacy under the extended meaning of life. The chapter also examines the piecemeal and incomplete protections accorded to privacy interest under statutory laws and common law principles. It seeks to argue that in the absence of statutory protection, common law principles that are recognised by Article 160 (2) of the Constitution may provide the necessary protection. It also assesses the power of the Human Rights Commission as a statutory body in providing institutionalized protection on right of privacy in Malaysia.

Chapter 6 considers the issue of accommodating competing interests. It concentrates on three possible approaches to resolve the issue. The chapter examines the balancing approach as the common approach to the issue. This chapter argues that the approach is inappropriate due to distortions in the exercise of balancing approach. In addition, it also examines the principle of proportionality as an approach that may provide satisfactory resolution. Furthermore, the chapter also discusses another accommodating principle based on incommensurability. The latter approach does not require balancing exercise, instead it provides for resolution of competing interests by way of choice.

Chapter 7 presents the critical analysis on the freedom of the press and privacy in Malaysia and the UK. It analyses protection of privacy based on three models. It seeks to establish that universalism, as a model does not reflect the actual requirement of local needs and conditions. Reliance on local particularities as the model for protection of human rights may be unreasonable considering the fact that modern society evolves. The

Malaysian government is more in favour of this model in protecting the interest of the nation and its people. The justification for such a stance is that foreign elements are incompatible with the local culture and social lives. The chapter seeks to argue that the third model on reflective equilibrium provides a pragmatic approach in protecting human rights. This model manages to integrate the universal principles with the local needs and conditions by concentrating on the compatibility aspect rather than the differences. It also seeks to submit that the press in Malaysia needs liberalisation in term of regulation. This is to allow the press to function effectively in creating a vibrant democracy. The chapter will argue that self-regulation in Malaysia is not appropriate under the present conditions.

Chapter 8 will conclude that the provision of necessity and expedience in Article 10 (2) of the Malaysian Constitution impairs the development of the law particularly in relation to freedom of expression and the press. As such, the power of the courts to check any transgression of fundamental rights is limited due to the constitutional supremacy. The chapter will also reveal that the provision gives a wide power to the legislature and the executive to set the parameters of the exercise of the freedom of expression and the press. In this regard, the writer will conclude that there is a necessity to liberalise the press. The chapter will also recommend for the creation of a specific body to regulate the conduct of the press in its relation with the public. This should exist in the form of a statutory body instead of an independent self-regulatory body on a co-regulation basis. Finally, the chapter will conclude with a recommendation that there should be a specific law on privacy in Malaysia. The writer will also suggest that the law could be incrementally developed by the courts in the absence of the willingness of the government to introduce the law. Considering the lack of commitment by the government on privacy as a fundamental right at the time the study is conducted, the introduction of the law on privacy could be informed by the dynamism of the common law.

CHAPTER 2

FREEDOM OF EXPRESSION IN THE UK

2.0 INTRODUCTION

Freedom of expression is a right of fundamental importance in a liberal-democratic society such as in the United Kingdom (UK). Most obviously, this right serves the interests of individuals in the society. Yet, it also serves wider interests such as the public interests in a vibrant democratic discourse. However, the importance of freedom of expression does not make it an absolute right. Now given effect in the UK by operation of the Human Rights Act 1998 (HRA), Article 10 (1) of the European Convention on Human Rights (ECHR) declares that ‘Everyone has the right to freedom of expression’. Nevertheless, the article also recognises several interests deemed to be necessary in a democratic society, as exceptions to the exercise of freedom of expression. These interests are, for instance, national security, territorial integrity or public safety, disorder or crime, health or morals and reputation or rights of others.⁴⁹

Traditionally, the common law perceived freedom of expression as a negative right. On this point, Berlin regards negative liberty as freedom from interference.⁵⁰ This notion imposes limitations on the extent of freedom that people can enjoy. It does not recognise freedom of expression as an intrinsic personal right that can be invoked in case of infringement. In other words, it is a residual of what is prohibited by the law.⁵¹ In this regard, Lord Donaldson explained in *AG v Guardian Newspapers (No 2)*⁵² that ‘the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law or by statute.’⁵³ Thus, freedom to express or hold opinions as well as to receive and impart information is exercisable only within the confines of law.

⁴⁹ Article 10 (2) of the European Convention on Human Rights 1950.

⁵⁰ Berlin, I. (1969) *Four Essays on Liberty*. London, Oxford University Press.

⁵¹ Lord Irvine. (2003) *Human Rights, Constitutional Law and the Development of the English Legal System*. Oxford, 21.

⁵² [1990] 1 AC 109.

⁵³ This remark reflects Hobbesian point of view where ‘freedom lies in the silence of law’. See Macpherson, C. B. (ed.) (1968) *Leviathan*. Middlesex, Penguin Books.

The threat of erosion of the right is greater because prohibitive laws can always be introduced by the sovereign legislature.⁵⁴ Protection of fundamental rights under this residual approach is less convincing as it depends on the will-power of the government. Socio-political and economic interests often influence the will-power. In this context, Dworkin argues that a government may have a ‘mundane and corrupting insensitivity to liberty.’⁵⁵ Thus, as far as the UK is concerned, there is a need for protection of the Human Rights Act 1998.

On the other hand, it is untenable to say that freedom of expression is intended to accord every citizen an absolute right to speech, write or print whatever he might please, without any responsibility, public or private. Civil society embracing democratic values cannot subsist under such circumstances. In such a society, freedom to express and publish relates to conduct of an individual that concerns other people. In this relation, there are situations when restrictions are necessary to protect other countervailing interests, public or private, such as security and crime, or reputation and privacy. The basic question that needs to be addressed is should the exercise of the freedom be allowed to its fullest meaning or is restriction required?

This chapter will examine the state of freedom of expression in term of its application and restrictions in the UK. It also discusses the effect of the Human Rights Act 1998 (HRA) on freedom of expression, the role of the Act as an impetus to the shift of approach in dealing with freedom of expression in the UK. Investigation also will be conducted on the exercise of freedom of the press, particularly on the efficacy of self-regulatory system as practiced in the UK. However, before turning to the details of the UK law, the rationales for freedom of expression should first be examined.

2.1 JUSTIFICATIONS FOR FREEDOM OF EXPRESSION

Justifications from political or moral perspectives have been employed to reject or support the inhibition of freedom of expression. Justification for freedom of expression can be classified into two, instrumental and intrinsic. The most common defence of

⁵⁴ See per Lord Reid in *Madzimbamuto v Lardner-Burke* [1969] AC 645, 723.

⁵⁵ Dworkin, R. (1988) *A Bill of Rights for Britain?* London, 9.

freedom of expression relies on the former. Instrumentalism or consequentialism treats freedom of expression as valuable because it contributes to some desirable state of affairs (Barendt, 1985; Greenawalt, 1989; Raz, 1991). On the other hand, instrumental justification does not make people possess any intrinsic moral right to say whatever they wish. The core argument by instrumentalists is that the value of freedom of expression is an acquired value, as a mean co-exists with other valuable ends.⁵⁶ The justifications put forward by this argument, *inter alia*, are pursuit of truth, autonomy or self-fulfillment and democracy. Arguably, instrumentalism is fragile in the sense that it allows other interests to inhibit the right rather than protecting it. It is also limited because protection is mainly focused on one category of expression, political speech.⁵⁷

2.1.1 TRUTH

The search for truth is made possible through the market place of ideas where all kinds of information is available free and uninhibited. John Milton propounds the justification on truth in his celebrated writing, *Areopagitica*.⁵⁸ Milton's argument on truth is used in the context of abhorrence against a system that imposed prior approval and licensed by the Crown for all books printed.

The defence of freedom of speech based on truth is closely associated with John Stuart Mill in his writing *On Liberty*.⁵⁹ The crux of Mill's argument is that freedom of speech in its full meaning can lead to the finding of truth. He argues that there should be the widest possible latitude for freedom of speech regardless true or false as both types of speech help in the pursuit for truth. Restrictions on freedom of speech will only inhibit the pursuit of truth and impede the ascertainment of accurate judgment.⁶⁰

⁵⁶ See Greenawalt, K. Free Speech Justifications. (1989) *Col. L R* 89. See also Mullender, R. (2002) *Freedom of Political Expression*. In Alder, J. *General Principle of Constitutional and Administrative Law*. Houndmills, 458.

⁵⁷ Dworkin, R. (1999). *Freedom's Law: The Moral Reading of the American Constitution*. Oxford, 201.

⁵⁸ Rhys, E. (ed.) (1927) *Areopagitica and other Prose Works of John Milton*. London, J.M. Dent & Sons Ltd.

⁵⁹ Gray, J. (ed.) (1998) *John Stuart Mill On Liberty and Other Essays*. Oxford, Oxford University Press.

⁶⁰ *Ibid*, 21.

The justification of free speech on Mill's account is instrumental because he believes that the publication of a possibly true statement is the highest public good. Mill also believed that truth could be revealed through the so-called free market of ideas. Free market idea is considered as an opportunity where open discussions can lead to truth. This is articulated by Justice Holmes in *Abrams v United States*⁶¹ when he said that 'the best of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can safely be carried out.'⁶²

In a modern society, this can be equated to open discussions with technology sources through the information super-highway on internet. Nevertheless, it is hard to defend the attainment of truth when unequal accessibility exists in *laissez-faire*.⁶³ The openness of the market gives advantage to the dominant party to control the dissemination of information. For instance, the government or the owner of the media is in the position to suppress news coverage or project certain agenda. Moreover, preferred ideas can always dominate the market by way of powerful manipulation for political or commercial interests. It is doubtful if there is a level playing field under this situation. Thus, the notion of the free market has to be considered with some scepticism.⁶⁴ In today's context, the market is influenced by commercial considerations, which treat information like any other profitable commodities. The attainment of truth through market model may not be feasible if the concern is on distribution of information through this manner.⁶⁵

The exercise of freedom of speech in a wider sense, regardless of true or false, as propagated by Mill is incongruent with the aspiration of tolerance in maintaining peace within a plural society. Though vigorous discussion would enable the truth to emerge out of false speech, the immediate adverse effect of false speech on public order, for instance, need to be balanced against the long term benefits of uninhibited discussion.⁶⁶

⁶¹ (1919) 250 U.S. 616.

⁶² Ibid, 630.

⁶³ Feldman, D. (2002) *Civil Liberties and Human Rights in England and Wales*. Oxford, 810.

⁶⁴ William, B. (1979) *Report of the Committee on Obscenity and Film Censorship*. Cmnd 7772, para 5.19.

⁶⁵ Campbell, T. (1994) *Rationales for Freedom of Communication*. In Campbell, T. and Sadurski, W. (eds.) *Freedom of Communication*. Aldershot, 24.

⁶⁶ Barendt, E. (1985) *Freedom of Speech*. Oxford, 10.

2.1.2 AUTONOMY

Another justification for freedom of speech, which has an intrinsic value, is autonomy. Freedom of expression is valued in liberal thought because it empowers the autonomy of personhood.⁶⁷ It is an integral part of individual self-development and fulfillment. Autonomy of a person to form judgment exists if he is free to consider for himself various arguments from different courses of action.⁶⁸

This theory seeks to defend freedom of expression from interference that may curtail the exercise of independent judgment. This is because freedom of expression promotes individual autonomy, which is a valuable end in itself. The ability to choose one's own course in life without interference is a virtue of human dignity. Thus imposition of restriction will only injure dignity and a thwart to self-fulfillment.⁶⁹ Some writers consider this theory from the non-consequentialist point of view and defend the theory in its narrow sense (Scanlon, 1972; Brison, 1998; Dworkin, 1999).

However, Greenawalt argues that autonomy contributes to other satisfactions that are morally good.⁷⁰ Freedom of expression helps to achieve an independent judgment and informed decision-making, an aspect of traditional liberal theory. As a responsible moral agent, a person should be given the opportunity to make his own decision without interference. Thus, suppression of speech should not be exercised on the ground of harmful belief or indulge in harmful acts. In order to make an independent judgment he should be free to discuss and debate openly. Only then is he capable to arrive at his own moral conviction.

Argument from autonomy rules out any kind of dictation or external interference. Therefore, the element of sovereignty in making a decision as to what to believe is vital in order to become an autonomous person. Autonomy also requires a person to be able to exercise an independent judgment before accepting the views of others. From a

⁶⁷ Scanlon, T. A Theory of Freedom of Expression (1972) 1 *Philos Public Aff* 204.

⁶⁸ Barendt, op. cit., n. 64, 19.

⁶⁹ Hirsch, A.V. Injury and Exasperation: An Examination of Harm to Others and Offense to Others. (1986) *Mich. L R*, 705.

⁷⁰ Greenawalt, K. Free Speech Justification. (1989) *Col. L R* 89, 119.

communitarian point of view, a person needs to apply rationality in exercising his sovereignty in making decisions and weighing conflicting interests. This is because the independent judgment of an autonomous person might not be entirely the exercise of his sovereign faculty. Rather it is influenced by external factors that affect his rationality.⁷¹

An autonomous person who is in full possession of his faculties ought to bear the consequence of his own judgment. If he could not be deprived of his independent judgment, he also could not assign the responsibility for the harm he could cause to others. To do so would tantamount to relinquishing the status of rational, sovereign and autonomous agent.

2.1.3 DEMOCRACY

Freedom of expression is a necessary and a vital element of a democratic society. From a constitutional standpoint, democracy means that a government is subject to conditions of equal status for all citizens.⁷² The argument from democracy asserts that freedom of expression is essential in providing the citizens with the information they need in order to exercise their choice and to engage in the necessary deliberative process in making the choice. But the view from the minority plays a role in keeping the government under scrutiny and alerting the public to any malpractice that affect their interests. Thus, the exercise of free expression under constitutional democracy sometimes permits the interest of minority to prevail over the power of majority.⁷³ Democratic society flourishes socially as well as politically when freedom of expression is given ample space without undue curtailment. An example to support the point is the debate in the UK on the legitimacy of the war in Iraq, which informed the people to assess the performance of the government.

The process of democracy allows public opinion on matters that not only affect their personal interests but also the public interest. The space and respect given by democracy has made it the most influential vehicle for the exercise of freedom and liberty. It can be

⁷¹ Kymlicka, W. (1991) *Liberalism, Community and Culture*. Oxford, 61.

⁷² Raz, J. Free Expression and Personal Identification. (1991) 2 *OJLS*, 323.

⁷³ Allan, T. R. S. (2000) *Common Law Constitutionalism and Freedom of Speech*. In J. Beatson and Y. Cripps (eds.) *Freedom of Expression and Freedom of Information*. Oxford, 17.

said that the argument from democracy presents three sets of interests. First, is the interest of the speaker in exercising his liberty to participate in the process of democracy. Second, is the interest of the government in measuring their effectiveness and even popularity based on criticisms and public reactions. Third, is the interest of the public in being well informed so that they are better able to make judgment on issues affecting them as a whole.

Notably, democracy involves people in shaping the government. It allows the people to voice-up their concern on issues that affect their interest. Discussion on issues of public interest by pressure groups such as Liberty UK, Amnesty International and Article 19 organisation, sometimes give impact on the government's action. The peoples' liberty and equality are the embodiments of this collective framework that must be respected. Their participation in the process enables them to communicate their ideas, propositions, responses and even criticisms. In making democracy a functional process, freedom and liberty to express, thus, must be protected. In this regard, it is not just the right to express but the exercise of that right that reflects the functional part of democracy.

Democratic society plays a role to check and balance elected institutions. It is against the tenets of democracy to restrict public opinion and participation in a just and transparent government. For this reason, the call for open and accountable government is common. On the other hand, a vibrant democratic right such as freedom of expression may not flourish if democracy is only confined to a representative system.⁷⁴ It also allows the executive to become a powerful body in situation where there is a vague separation of power. In this regard, Rawls observes that 'power is corruptible, fallible and inefficient, it should not be trusted. It should be hedged and fenced.'⁷⁵ Under a powerful executive, the scope of freedom of expression is determined in accordance with policies set by them. The effect would be that public participation might no longer have a forceful impact. The participation is limited to consultation of democratic input, which may be of less value in framing the policies.

⁷⁴ Feldman, D. (2002) *Civil Liberties and Human Rights in England and Wales*. Oxford, Oxford University Press.

⁷⁵ Rawls, J. (1970) *A Theory of Justice*. Oxford, 428.

As much as democracy upholds freedom of expression, it also necessitates regulations on free expression. This is because plural values are recognized in democracy. The needs to preserve social harmony and public order are a constitutive part of a democratic society. Therefore, the people must be prepared to waive certain rights and freedom for the sake of the society as a whole. It is difficult to maintain that inhibition of freedom of expression is against democratic values since the inhibitions exist through a democratic process under the representative system. On the other hand, democracy does not condone total freedom of expression. For instance, in order to avoid a harmful effect on racial harmony in a plural democratic society, racial and hate speech need to be constrained. This can be illustrated with the events of racial riots in the UK and Malaysia, in 2001 and 1964 respectively, where in both cases racial and hate speech triggered bloody incidents. Democracy is pragmatic in the sense that it allows the exercise of freedom and at the same time necessitates restriction on the basis of toleration.⁷⁶

Open discussions and debates contribute toward social change, which may provide fair opportunity for the people to participate. It also prevents institutional stagnation by authoritarianism under which public discussion is orchestrated in pursuant to the interest of the authority rather than the governed.⁷⁷ People respond and react when their interests are affected. For instance, in the UK the government's plan to introduce a mandatory possession of identity card receive mixed response from the public. The skeptics argue, *inter alia*, the identity card would erode the human rights especially with regard to invasion of privacy.

Moreover, expression of a state of unhappiness should not be restricted especially when it involves public expressions on communal matters. This is a form of public participation, which serves as check and balance to any collective and transparent governance. Nevertheless, if the communicative activities cross the legal limits and affect other recognized interests, public or personal, restriction is a legitimate course of action. On

⁷⁶ Harris, et al (1995) *Law of the European Convention on Human Rights*. London, Butterworth, 377.

⁷⁷ Kersch, K. I. (2003) *Freedom of Speech: Rights and Liberties under the Law*. Santa Barbara, 212.

this premise, perhaps democracy is the most persuasive justification for freedom of expression.⁷⁸

2.2 THE EXERCISE OF FREEDOM OF EXPRESSION IN THE UK

2.2.1 PROTECTION OF FREEDOM OF EXPRESSION

Traditionally, the protection of freedom of expression in the UK is accorded by the common law. The freedom is secured through judicial decisions, which determine the rights of individuals and the courts protect those rights by granting appropriate remedies. However, the courts are powerless in protecting the rights when Parliament introduces restrictive laws that affect the rights. This is because in the UK, Parliament possesses absolute power to legislate any law under the principle of Parliamentary supremacy.⁷⁹ The courts have no power to abrogate law enacted by Parliament. This is illustrated by the recent decisions of the House of Lords that ruled against the Anti-Terrorism law in the UK.

From this perspective, freedom of expression is a negative right that is merely the residue of freedom left after restrictions imposed by the law. This renders the exercise of freedom of expression relying on the commitment of the legislature in upholding individual liberties. This position is explained by Lord Donaldson when he said that ‘the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law or by statute’.⁸⁰

The UK approach in relation to freedom of expression is influenced by Dicey⁸¹ who regards individual liberty in term of residual character. Under this approach, a person is free to do anything as long as there is no legal restraint. The absence of a positive right renders it subservient to other competing public and private interests. According to the traditional view, the legality of restrictions on the right cannot be challenged since the power to determine the scope of the right rests with Parliament.

⁷⁸ Barendt, E. (1985) *Freedom of Speech*. London, 23.

⁷⁹ Mullender, R. Parliamentary supremacy, the constitution and the judiciary. (1998) 45 *NILQ* 138.

⁸⁰ *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109, 283.

⁸¹ Dicey, A.V. (1959) *Introduction to the study of the law of Constitution*. London, Macmillan.

On the other hand, the government through the influence of the executive can also set limit on freedom of expression in order to protect other interests. This is possible by proposing new laws, which have the effect of restricting the right, to Parliament. The government also can leave the matter to the courts to develop legal principles on the basis of common law system.⁸²

However, there are some types of speech that enjoy protection in positive terms.⁸³ The protection of individual liberty in the UK is described in *Liversidge v Anderson*⁸⁴ where the safeguard of the British liberty is in accordance with the particularities of the people. This is also reflected in the system of representatives and the responsible government, which has evolved. This approach is illustrated in the classical case *Beatty v Gillbanks*.⁸⁵ In this case a march organised by the Salvation Army was forbidden because it would attract a large hostile crowd of people, thereby causing a breach of peace. The organizer ignored the order not to assemble and they were bound over to keep the peace for having committed the crime of unlawful assembly. On appeal, the order binding them over was set aside because the court found that they had done nothing wrong. The court held that they couldn't be prohibited from assembling merely because their lawful conduct might induce others to act unlawfully. Previously, freedom of expression in the UK was not guaranteed by a written constitution such as in the United States of America or Malaysia, but it is now guaranteed under the Human Rights Act 1998.

In the UK, freedom of expression acquires high regards, as it constitutes an important part of individual liberties. Lord Goff emphasises this in *AG v Guardian Newspapers Ltd (No 2)* when he stated that 'freedom of expression has existed in this country perhaps as long, if not longer, than it has existed in any country in the world.'⁸⁶ It is highly regarded by Lord Steyn as intrinsically important because 'it is value for its own sake.'⁸⁷ This

⁸² The surrogating of privacy under breach of confidence is an example to the point.

⁸³ Debate and proceedings in Parliament are protected against legal action. Media reporting on parliamentary proceedings are subject to absolute privilege. Reports of courts proceedings are protected as long as it is fair, accurate and without malice. Parliamentary papers and their publishers receive statutory protection.

⁸⁴ [1942] AC 206.

⁸⁵ [1882] 9 QBD 308.

⁸⁶ [1990] 1 AC 109, 285.

⁸⁷ *R v Secretary of State for the Home Department, ex p Simms* [1999] 3 WLR 328, 337.

simply means that the importance of freedom of expression does not rely on the consequentialists account. Hoffmann LJ gives similar emphasis when he opined that in case of a clash between freedom of speech and other interests, where there is no clear exception defined by the law, the former is a 'trump card which always wins.'⁸⁸ While this may not be true, it suggests that there is a strong presumption in favour of freedom of expression. Nevertheless, the judicial depiction of freedom of expression is arguable. Lord Bridge in *R v Secretary of State for the Home Department, ex parte Brind*⁸⁹ said that:

Most of the rights spelled out in terms in the Convention, including the right to freedom of expression, are less than absolute and must in some cases yield to the claims of competing public interests. Thus, Article 10 (2) of the Convention spells out and categorises the competing public interests by reference to which the right to freedom of expression may have to be curtailed.⁹⁰

The existence of several restrictive laws, such as Official Secrets Act 1989 and Public Order Act 1986, raises concern over the complacent view on the exercise of freedom of expression in the UK.⁹¹ The laws allow for limitations on personal liberty for the purpose of protecting wider interest of the community. This raises a question of the UK's commitment in protecting freedom of expression. The violation of Article 10 of the Convention by the UK in several cases shows that the inhibition of freedom of expression is inconsistent with the Convention acceded by the government.⁹² Perhaps the UK should be more sensitive in preserving fundamental liberties considering the fact that it was the first country to ratify the ECHR in 1950.

⁸⁸ *R v Central Independent Television plc* [1994] 3 WLR 20, 30.

⁸⁹ [1991] 1 AC 696.

⁹⁰ *Ibid*, 748

⁹¹ Barendt, *op. cit.*, n. 76, 304.

⁹² See *Bowman v UK* (1998) 26 EHRR 1, *Goodwin v UK* (1996) 22 EHRR 123, *Tolstoy Miloslavsky v UK* (1993) 20 EHRR 442, *Observer and Guardian v UK* (1992) 14 EHRR 153 and *Sunday Times v UK* (1979) 2 EHRR 245.

2.2.2 THE SCOPE OF FREEDOM OF EXPRESSION UNDER THE HUMAN RIGHTS ACT 1998

Protection of freedom of expression in the UK enters into a new phase after the enforcement of the Human Rights Act 1998. The Act alters the foundation of individual rights in the UK. It affirms fundamental rights by introducing a right-based scheme. Under this approach, individuals are entitled to claim and defend their rights against infringement. Freedom of expression is now protected by operation of a statute that gives further effect to ECHR rights. In this respect, Lord Keith in *Derbyshire County Council v Times Newspapers Ltd*⁹³ said:

I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field.⁹⁴

Recognition of freedom of expression as an individual right under the Act imposes an obligation to ensure its protection. However, this is subject to the exceptions in Article 10 (2) of the ECHR. The right acquires a fundamental status that must be given effect by the courts. This is in contrast with the traditional view under Dicey's approach where the exercise of freedom of expression is not on the basis of positive right. The incorporation of European Convention on Human Rights (ECHR) by the Act provides explicit statutory protection for freedom of expression. The Act imposes a duty on public authorities in the UK to act compatibly with the Convention rights.⁹⁵ The courts have to give specific consideration to freedom of expression in order to ensure the application of the Convention rights. Article 10 (1) of the Convention provides:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

⁹³ [1993] AC 534.

⁹⁴ Ibid, 553. See also per Lord Goff in *AG v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283.

⁹⁵ Section 6 of the Human Rights Act 1998.

Under this provision every individual has the right to say and hold opinions as well as to receive and impart information without undue interference. A person can always invoke the right to protect his interest against other countervailing interests such as privacy. Although the protection given is in a positive form, it does not make the right absolute. There are duties and responsibilities that come with the exercise of the right.⁹⁶ The value of freedom of expression is relatively reduced in case of conflict with interests under the purview of legitimate exceptions. These exceptions are mentioned in Article 10 (2) which includes:

1. National security
2. Territorial integrity or public safety
3. Prevention of disorder or crime
4. Protection of health or morals
5. Protection of reputation or rights of others
6. Prevention of disclosure of information received in confidence
7. Maintaining the authority and impartiality of the judiciary.

This is in contrast with the situation before the implementation of the Act where freedom of expression could be restricted on any ground as long as the restriction is imposed by law. Previously, there was no question on the nature of restriction even though it was draconian and autocratically imposed. For example in *Brind v Secretary of State for the Home Department*⁹⁷ the government banned live media interviews with supporters of the IRA. The House of Lords held that, although the ban was probably misguided, it had some rational basis as a means of denying publicity to terrorists and was therefore valid. Moreover, the doctrine of Parliamentary supremacy in the UK, where Parliament has an absolute power to create any law, impedes the prospect of challenging the legality of restriction on freedom of expression. However, the courts may now declare any legislation to be incompatible with the Convention rights under section 4 (2) of the Act. Even though a declaration of incompatibility does not have any impact on the validity, operation or enforcement of the legislation,⁹⁸ it may result in political pressure, domestically and internationally, for the government to change the law. Nevertheless, the

⁹⁶ Article 10 (2) of the European Convention on Human Rights.

⁹⁷ [1991] 1 AC 696.

⁹⁸ Section 4 (6) (a) of the Human Rights Act 1998.

final decision to bring any domestic law in conformity with the Convention is the prerogative of Parliament.

Under the Human Rights Act 1998, restrictions must fulfill the requirement of 'proportionate to the legitimate aim pursued.'⁹⁹ It allows a dissentient individual to argue for their Convention rights where the legality of restriction on freedom of expression can be questioned.

2.2.3 POLITICAL EXPRESSION

Article 10 of the Convention does not create a hierarchical classification of expression. The scheme of protection under the provision covers all types of expression.¹⁰⁰ But classification of expression is necessary because the degree of protection is influenced by the value attaching to expression.¹⁰¹ The value is given relatively by reference to the purpose and interest of the expression. With regard to this, there are three broad categories of interest in expression. They fall under political, commercial and artistic expressions.¹⁰²

There is a difficulty to create a clear boundary between political speech and other forms of expression. In this regard, Hare argues that it is unsatisfactory to define political speech based on the intention or identity of the speaker.¹⁰³ Sometimes the real intention is a commercial motivation whereby the main contributors to political speech are newspapers. On the other hand, Barendt views that political speech should refer to 'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.'¹⁰⁴

⁹⁹ *Handyside v UK* (1976) 1 EHRR 737, para. 49.

¹⁰⁰ *Muller v Switzerland* (1988) 13 EHRR 212.

¹⁰¹ Bailey et al (1991) *Civil Liberties: Cases and Materials*. London, 298.

¹⁰² Harris et al (1995). *Law of the European Convention on Human Rights*. London, 397. Section 12 (4) of the Human Rights Act 1998 provides for three types of expressive materials. They are journalistic, literary, and artistic. Political speech may come under the journalistic category.

¹⁰³ Hare, I. (2000). *Is the Privileged Position of Political Expression Justified?* In Beatson, J. and Cripps, Y. (eds.) *Freedom of Expression and Freedom of Information*. Oxford, 108-9.

¹⁰⁴ Barendt, op. cit., n. 76, 152.

It is safe to say that political expression relates to matters pertaining to the nation and its relation with the people. This narrow view was formed by the Court of Appeal of New Zealand in the case of *Lange v Atkinson*¹⁰⁵ and was adopted by the House of Lords in *Reynolds v Times Newspapers Ltd.*¹⁰⁶ The Court confined political speech only to 'statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to be members, so far as those actions and qualities directly affect or affected their capacity...to meet their public responsibilities.'¹⁰⁷

There is a presumption that political expression is more important than other categories of speech.¹⁰⁸ Lord Bridge of Harwich in *Hector v A-G of Antigua and Bermuda*¹⁰⁹ observed that:

In a free and democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.¹¹⁰

Political expression typically receives a high level of protection.¹¹¹ It dominates the area of and scope of discussion on matters pertaining to public issues. Expression of this kind is not only a matter of political parties or politicians. It also covers the process of democracy and the utmost important is the well being of the nation.

In the UK, political expression acquires a high value that merits protection.¹¹² This type of expression is viewed as the 'core'¹¹³ of free speech, 'lifeblood of democracy'¹¹⁴, and

¹⁰⁵ (1998) 3 NZLR 424.

¹⁰⁶ [1999] 2 AC 127.

¹⁰⁷ Ibid, 428.

¹⁰⁸ *Lingens v Austria* (1986) 8 EHRR 407, 419.

¹⁰⁹ *Hector v A-G of Antigua & Bermuda* [1990] 2 AC 312.

¹¹⁰ Ibid, 318.

¹¹¹ See *Derbyshire v Times Newspapers* [1993] AC 534, *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 and *R (ProLife Alliance) v BBC* [2002] 2 All ER 756.

¹¹² Hare, op. cit., n. 100, 105.

¹¹³ Lord Keith in *Derbyshire County Council v Times Newspapers Ltd* [1993] 1 All ER 1011, 1020.

¹¹⁴ Lord Steyn in *R v Sec of State, ex parte, Simms* [1999] 3 All ER 400, 408.

‘bedrock principles’.¹¹⁵ Lord Steyn portrays its function as ‘a brake on the abuse of power by public official. It facilitates the exposure of the errors in the governance and administration of justice of the country.’¹¹⁶ The courts give more weight to freedom of political debate because of its importance in democratic society.¹¹⁷ This is emphasised by the court in *R v Home Secretary, ex p. Simms*.¹¹⁸ The House of Lords in this case held that a prisoner has a right to a visit from a journalist in order to campaign for his conviction to be quashed. Lord Steyn said that it facilitates the exposure of errors in the governance and the administration of justice of the country. The House of Lords in *Derbyshire County Council v Times Newspapers*¹¹⁹ cautions the impact on free speech if public bodies are able to sue their critics where it could silent legitimate public criticism of their activities.

Protection of political speech is available under common law as well as statute law. Protection based on common law system shows that the United Kingdom has adequate measures to deal with freedom of expressions.¹²⁰ Common law is perceived as flexible and receptive to the changing circumstances informed by moral argument. In one classic case relating to expressive conduct in *Beatty v Gillbanks*¹²¹ the court held that it was unlawful to prohibit people from assembling merely because their lawful conduct might induce others to act unlawfully. Lord Bridge in *A-G v The Guardian*,¹²² in his dissenting judgment, expressed his confidence in the capacity of common law to safeguard the fundamental freedom essential to a free society including the right of freedom of speech.

There are areas in which wide freedom of expression enjoys statutory protection in English law. This is in the context of Parliamentary proceedings and court proceedings. Members of Parliament are accorded absolute privilege against libel actions. They enjoy immunity from legal action over allegations they make in the course of Parliamentary

¹¹⁵ Laws LJ in *R (ProLife Alliance) v BBC* [2002] 2 All ER 756.

¹¹⁶ *R v Secretary for the Home Department, ex parte, Simms* [1999] 3 WLR 328, 337.

¹¹⁷ See *Lingens v Austria* (1986) 8 EHRR 407, *Castells v Spain* (1992) 14 EHRR 445, *Goodwin v UK* (1996) 22 EHRR 123 and *Oberschilk v Austria* (1998) 25 EHRR 357,

¹¹⁸ [2000] 2 AC 115. See also per Lord Nicholls in *Reynolds v Times Newspapers Ltd* [1999] 1 AC 127, 202.

¹¹⁹ [1993] AC 534.

¹²⁰ Common law principles such as defamation, breach of confidence and negligence.

¹²¹ (1765) 19 St Tr 1030.

¹²² [1987] 1 WLR 1248, 1286.

proceedings.¹²³ Nevertheless, public responses and criticisms through media sometimes prove as an effective way in making the members of Parliament accountable for their statements. In the UK, the latitude on freedom of expression is shown in the remark of Sedley LJ when he said:

Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not provoke violence. Freedom only to speak inoffensively is not worth having.¹²⁴

On the other hand, there are situations where political expression is restricted for the purpose of other countervailing interests such as security and public order. The commitment of the government in protecting freedom of expression came under scrutiny in *Farrakhan v Secretary of State for Home Department*.¹²⁵ In this case, the Home Secretary refused Mr. Farrakhan entry because his admission would have an effect on community relations. There is also the risk that meetings attended by him would stir disorder. Though there was no proof of the imminent risk, the court concluded that the Secretary of State provided sufficient explanation for a decision that did not involve a disproportionate interference with freedom of expression.

The government's reasoning on expression that could pose a risk to public order may be seen as inconsistent and discriminatory. The government allowed the presence of Dr. Yusof Qardhawi, an influential Islamic cleric, though there were allegations that his controversial views on Iraq war and anti-semitic could affect public order.¹²⁶ In this context, the courts were reluctant to interfere with the imposition of restriction by the executive. This can be deduced from the judgment of Lord Phillip MR when he said:

When applying a test of proportionality, the margin of appreciation or discretion accorded to the decision maker is all important, for it is only by recognising the margin of discretion that the court avoids substituting its own decision for that of the decision maker.¹²⁷

¹²³ The press and media broadcast also enjoy immunity when they carry reports of Parliamentary debate.

¹²⁴ *Redmond-Bate v DPP* (1999) 7 BHRC 375, 383.

¹²⁵ [2002] EWCA Civ. 606.

¹²⁶ These two instances show that the executive has wide power and margin of appreciation in security and public order.

¹²⁷ *Farrakhan v Secretary of State for Home Department* [2002] EWCA Civ. 606, para 67.

Arguably, a similar degree of protection accorded to political expression is available in case of artistic expression, which we now turn to.

2.2.4 ARTISTIC EXPRESSION

Freedom of expression includes artistic expression. This type of expression relates to human creativity that covers not only books, theatrical works and paintings, but also posters, films and photography.¹²⁸ Article 19 (2) of the International Covenant on Civil and Political Rights provides for information and ideas ‘in the form of art’ within the right of freedom of expression. In addition, section 12 (4) of the Human Rights Act 1998 requires the court to give particular regard to the importance of the right to freedom of expression in situation which involves material of, *inter alia*, artistic in nature. The Court in *Muller v Switzerland*¹²⁹ explained that:

Admittedly, Article 10 does not specify that freedom of artistic expression, in issue here, comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression...it includes freedom of artistic expression-notably within freedom to receive and impart information and ideas-which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.¹³⁰

The absence of hierarchical order of expression under Article 10 of the ECHR means that artistic expression is also covered under the scheme of protection. For instance, in *Karatas v Turkey*¹³¹ the applicant, a Turk of Kurdish origin, published an anthology of poems entitled ‘*The Song of a Rebellion*’. He was convicted of disseminating propaganda against the indivisible unity of the State. The medium used, poetry, is a form of artistic expression and the content had a political dimension. The applicant was a private individual expressing views through poetry to a small audience rather than via the mass media. The Court found that the applicant’s conviction was disproportionate to the aims being pursued and as such violated Article 10 of the Convention.

¹²⁸ Clayton, R. and Tomlinson, H. (2002) *Privacy and Freedom of Expression*. Oxford, 177.

¹²⁹ (1988) 13 EHRR 212. See also *Karatas v Turkey* (1999) 36 EHRR 6, para 49.

¹³⁰ Ibid, para 27.

¹³¹ (1999) 36 EHRR 6.

Even though artistic expression forms part of the concept of freedom of expression, it is not jealously protected as political expression.¹³² Perhaps the reason for a lesser value being attached to artistic expression is because the interest it covers is narrow. It acquires less weight in case of conflict with other interests. For instance, in relation to the protection of morality, obscene and indecent materials are prohibited under section 2 of the Obscene Publication Act 1964.¹³³ In *Muller v Switzerland*¹³⁴ the applicants had mounted an exhibition of contemporary art, which included three sexually explicit paintings depicting fellatio, sodomy and sex with animals. The exhibition had been widely advertised and was open to all, with no admission charge. The catalogue specially printed for the preview, contained photographic reproductions of the paintings. On the day of the official opening, the principal public prosecutor lodged proceedings demanding that the paintings be destroyed on the grounds that they were obscene. Following criminal proceedings, the paintings were confiscated and the applicants were fined. The European Court of Human Rights considered that the paintings widely depicted sexual relations, particularly between men and animals. The Court recognised that conceptions of sexual morality have changed. It did not find the view taken by the Swiss courts that the paintings were liable grossly to offend the sense of sexual propriety of persons of ordinary sensibility to be unreasonable. Thus, the imposition of the fine did not constitute a violation of the right to freedom of expression.

In addition, a wide margin of appreciation is given to national states by the ECtHR in assessing the necessity of restriction on artistic expression. In *Handyside v UK*¹³⁵ the applicant was charged and found guilty under the Obscene Publications Act 1959 for publishing an obscene book '*The Little Red Schoolbook*'. The ECtHR found that the UK government was not in breach of Article 10. The Court held that 'despite the variety and the constant evolution in the United Kingdom of views on ethics and education, the competent English judges were entitled, in the exercise of their discretion, to think at the relevant time that the Schoolbook would have pernicious effects on the morals of many

¹³² Barendt, op. cit., n. 101, 300.

¹³³ See also section 2 of the Theatres Act 1968 and section 11 of the Post Office Act 1953.

¹³⁴ (1988) 13 EHRR 212.

¹³⁵ (1976) 1 EHRR 737.

of the children and adolescents who would read it.’¹³⁶ The Court was reluctant to interfere with the discretion of national states in determining the protection of morals in a democratic society.

Furthermore, the provision of Article 10 (1) of the Convention that permits the imposition of licensing requirement on broadcasting, television and cinema also affects artistic expression. While the provision focuses on institution rather than its activities, it creates a potential threat whereby the government can impose certain conditions upon the issuance of license. For instance, section 1 (2) of the Cinemas Act 1985 provides:

A licensing authority may grant a licence under this section to such a person as they think fit to use any premises specified in the licence for the purpose of film exhibition on such terms and conditions and subject to such restrictions as...they may determine.

In addition, artistic expression can be restricted by the British Board of Film Classification (BBFC), which set the criteria for granting a certificate and viewing classification. In 1989, the BBFC denied a certificate to a video film, *Visions of Ecstasy*, which contained a scene of sexual imagery on the crucified figure of Christ and vivid expression of sexuality on the part of a nun.

However, restriction on artistic expression is not as strict as on commercial expression. This is because the content of the latter expression may include various issues from political, economic and social matters. This is illustrated by the BBC’s decision to broadcast the controversial ‘Jerry Springer - The Musical’ on the ground, *inter alia*, artistic significant and thus outweighed the offence caused to Christians.¹³⁷

2.2.5 COMMERCIAL EXPRESSION

The concept of freedom of expression, which embraces the freedom to receive and impart,¹³⁸ covers the form of communication as well as the content. Commercial expression is defined as an ‘expression that is directed to furthering the economic

¹³⁶ Ibid, para 57.

¹³⁷ Freeman, S. BBC ‘right’ to screen Jerry Springer musical. *Times online*, 30 March 2005.

<http://www.timesonline.co.uk/article/0,,2-1547719,00.html>

¹³⁸ Article 10 (1) of the European Convention on Human Rights.

interests of individuals and enterprises...'¹³⁹ The core object of commercial expression is business and economic rather than the proposition of ideas.¹⁴⁰ This forms the basis for the argument that commercial expression acquires less value, within a democratic framework, and thus receives less protection.¹⁴¹ Furthermore, regulation on this type of expression does not diminish the core value of free expression.

Munro argues that it is difficult to canvass a satisfactory definition of commercial expression.¹⁴² He also argues that it is not satisfactory to rely on a subject-matter approach or medium and form of expression approach because of the category crossover and overlap of expression. Unclear delineation may occur in advertisement that contains information that can be interpreted as commercial as well as political information.

Another approach that stresses on the intention or motives of the speaker¹⁴³ is also inconclusive. This is due to the difficulty in ascertaining intention and the existence of a mixture of motivation. In the absence of prioritization of some category of speech 'the attitude to commercial speech in English law is a stance of neutrality'.¹⁴⁴ The case of *Tolley v J.S Fry and Sons Ltd*¹⁴⁵ involves commercial expression in torts under English law. This case relates to the caricature of the plaintiff, a famous amateur golfer, featured in an advertisement for chocolate. The court held that the advertisement was an innuendo that he had unworthily permitted his likeness to be used commercially for reward. Though the expression in this case can be categorized as commercial, the legal action was under defamation law. It is immaterial for the purpose of liability in defamation to consider the category of expression.

In addition, common law principles may also inhibit commercial expression through the tort of passing off. For instance, in *Sim v H.J. Heinz Co. Ltd*¹⁴⁶ concerning unauthorised impersonation of the plaintiff's characteristic voice in a television advertisement

¹³⁹ Harris, et al (1995) *Law of the European Convention on Human Rights*. London, 403.

¹⁴⁰ Janis, et al (2000) *European Human Rights Law: Text and Materials*. Oxford, 200.

¹⁴¹ Feldman, D. (2002) *Civil Liberties and Human Rights in England and Wales*. Oxford, 199.

¹⁴² Munro, C. The Value of Commercial Speech (2003) 62 *CLJ* 134, 153.

¹⁴³ Scanlon, T.M. Freedom of Expression and Categories of Expression. (1979) 40 *U Pitt. LR* 519, 540.

¹⁴⁴ Munro, *supra*, 142.

¹⁴⁵ [1931] AC 333.

¹⁴⁶ [1959] 1 WLR 313.

promoting the defendant's product. The plaintiff argued that his voice as an actor was part of his stock-in-trade. Therefore, he was entitled to protect it as part of his good.

The categorisation of expression appears possible under section 12 (4) of the Human Rights Act 1998. The provision clearly mentions the classification of journalistic, artistic and literary materials. Unlike the position in the English law where there is no clear delineation of commercial expression, the ECtHR weighs commercial expression lightly. The Court accords a lesser value to this type of expression compared to political expression. In this context, Harris, et al observes that:

...commercial expression is not regarded as so worthy of protection as political or even artistic expression and that some considerations which make expression valuable in the political context may not apply in quite the same way in the commercial environment.¹⁴⁷

A wide margin of appreciation is given to the states in relation to commercial expression. In *Markt Intern v Germany*¹⁴⁸ the applicant published a trade magazine, which contained an article describing the experience of a chemist who was dissatisfied with a mail order firm and sought a refund. The Court decided that the interference was justified whilst the article as information of a commercial nature was protected under Article 10. In addition, the Court in *Casado Coca v Spain*¹⁴⁹ found that the penalty imposed on a barrister for distribution of advertising material could be justified under Article 10 (2). The regulation of advertising by barrister does not fall outside the wide margin of appreciation, which the states have on this matter.

It is rather unfortunate that the status of commercial expression in the UK was not determined in the case of *Colman v UK*¹⁵⁰. In this case, the applicant, a medical practitioner in a private general practice, wished to advertise his services. He wrote to the General Medical Council (GMC) seeking its advice and requested that the Council reviewed the existing rules on practice advertising. In reply the GMC declined to review its rules and warned him that if he advertised in the press, he would be subjected to

¹⁴⁷ Harris, op. cit., n. 136, 402.

¹⁴⁸ (1989) 12 EHRR 161.

¹⁴⁹ (1994) 18 EHRR 1.

¹⁵⁰ (1993) Application no. 16632/90.

disciplinary action. Following the Government's recommendation that the GMC relax its restrictions, the Council settled the matter with the applicant.

On the other hand, in *Jacobowski v Germany*¹⁵¹ the applicant argued that the prohibition imposed against distribution of his circular was a violation of Article 10. Such a margin of appreciation appears essential in commercial matters, in particular in an area of complex and fluctuating unfair competition. The court reiterated that 'a certain margin of appreciation is to be left to the contracting states in assessing whether and to what extent interference is necessary, but this margin goes hand in hand with European supervision covering both the legislation and the decisions applying it'.¹⁵²

Perhaps the touchstone for commercial expression is the furtherance of economic interests. In *R v Advertising Standard Authority Ltd, ex p. Charles Robertson (Developments) Ltd*¹⁵³ the court had the opportunity to deliberate on the classification of commercial and political expression. However, the court found that the distinction between political and commercial expression is of no assistance in determining the scope of the Advertising Standard Authority's jurisdiction. Nevertheless, Moses J said that:

...that distinction may (certainly once the Human Rights Act comes into force) be of importance in deciding whether action taken by the ASA interferes with the freedom enshrined in Article 10...¹⁵⁴

The right to commercial expression is protected by the Convention. Restrictions must be justified. The issue of protection of commercial expression in relation to Article 10 of the Convention emerges in *R (British American Tobacco UK Ltd) v Secretary of State for Health*.¹⁵⁵ In this case the court recognises that commercial expression is of less significance than political or artistic expression. The principal argument in this case is that the limitation on advertisement at point of sale infringes Article 10 of the Convention. The court held that restriction on promotion of extremely harmful but historically lawful products is proportionate to the objective of promoting health. In

¹⁵¹ (1994) 19 EHRR 64.

¹⁵² Ibid, para 26.

¹⁵³ [2000] EMLR 463.

¹⁵⁴ Ibid, 475.

¹⁵⁵ [2004] EWHC 2493, para 28.

making the decision the court takes into account the enormous health risks and economic costs to society caused by smoking tobacco.¹⁵⁶

Arguably, the vindication of protecting political expression more than artistic and commercial expression is informed by the utilitarian impulse. The protection accorded to this type of expression is due to its contribution in a democratic society. It is a prerequisite of a healthy democratic society that there should be no undue restraint on free expression. This includes the freedom of the press as a medium and source of information. This leads to the next discussion on freedom of the press.

2.3 SECTION 12 OF THE HUMAN RIGHTS ACT 1998: A PRIMARY RIGHT?

Protection of freedom of expression in the UK is further affirmed by section 12 of the HRA. Originally, section 12 was not part of the Human Rights Bill. It was only introduced later at the Committee stage by way of amendment to pacify the concern of the media over press freedom and the conflict with the right of privacy. The inclusion of the provision is mainly to protect press freedom. Section 12 (1) provides:

This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

The freedom of expression that section 12 seeks to protect is not confined to press freedom alone. It relates to the Convention right relating to freedom of expression in general. As such the protection includes all types of expression covered under Article 10 of the Convention. It includes communications by verbal or written words, which cover television programmes,¹⁵⁷ film,¹⁵⁸ videos,¹⁵⁹ pictures,¹⁶⁰ dress¹⁶¹ and images.¹⁶²

Furthermore, section 12 (4) succinctly provides that freedom of expression should be given particular regard by the court in connection with material of a journalistic, literary

¹⁵⁶ Ibid, para 52.

¹⁵⁷ *Hodgson v United Kingdom* (1987) 51 DR 136.

¹⁵⁸ *Otto-Preminger-Institute v Austria* (1994) 19 EHRR 34.

¹⁵⁹ *Wingrove v United Kingdom* (1996) 24 EHRR 1.

¹⁶⁰ *Muller v Switzerland* (1988) 13 EHRR 212.

¹⁶¹ *Stevens v United Kingdom* (1986) 46 DR 245.

¹⁶² *Chorherr v Austria* (1993) 17 EHRR 358.

and artistic nature. The emphasis on freedom of expression in this provision raises a question whether the right has priority over the other Convention rights. There is no distinction in term of order between freedom of expression and other Convention rights.¹⁶³ The rights are not set in any hierarchical or prioritisation order. The majority of the Court of Appeal in *Cream Holdings Ltd v Banerjee*¹⁶⁴ rejects the view that freedom of expression has priority over other Convention rights. However, there could be a presumption that freedom of expression prioritises other societal interests such as reputation.¹⁶⁵ As Simon Brown LJ said:

It is one thing to say...that the media's right to freedom of expression, particularly in the field of political discussion "is of a higher order" than "the right of an individual to his good reputation", it is, however, another thing to rank it higher than competing basic rights.¹⁶⁶

Section 12 recognises that the right to freedom of expression should be qualified. It also provides for a scheme of accommodation where other interest can override the exercise of free expression. Hence, privacy is only one of a number of qualifications.

2.4 RESTRICTIONS ON FREEDOM OF EXPRESSION

Freedom of expression is not only a symbol of democratic society but is the lifeblood of the society. Whilst freedom of expression enjoys legal protection in the UK, the existence of several restrictive laws, criminal or civil, raises concern as to the erosion of the right. Though it is important to protect freedom of expression in a democratic society, it is equally important to restrict certain expressions within the same society. The Royal Commission on the Press 1977 recognises this when it observed that the press should accept the limits to free expression set by the need to reconcile claims that may often conflict.¹⁶⁷

¹⁶³ See per Sedley LJ in *Douglas v Hello! Ltd* [2001] QB 967, 1004.

¹⁶⁴ [2003] 2 All ER 318.

¹⁶⁵ Rogers, H. and Tomlinson, H. Privacy and Expression: Convention Rights and Interim Injunctions. (2003) EHRLR (Special Issue) 37.

¹⁶⁶ *Cream Holdings Ltd v Banerjee* [2003] 3 WLR 999, 1017.

¹⁶⁷ Cmnd 6810, para 2.2-3.

A functional and vibrant democracy does not only reflect on the practice of freedom of expression, but it also requires regulations on it. Arguably, restriction on freedom of expression is necessary in order to avoid harmful effects on public and private interests. Public interest does not mean anything that may be of interest to the public. In relation to this, Lord Denning MR in *London Artists Ltd. v. Littler*¹⁶⁸ explained that:

Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment.¹⁶⁹

Nonetheless, Lord Philips MR in *Campbell v Mirror Group Newspapers*¹⁷⁰ held that a prominence on the public stage does not mean that one's private life is open for disclosure by the media.

The issue that needs further probing is, thus, the extent of the practice of freedom of expression. It is acceptable that restraints on freedom of expression should be imposed but only to the extent that they are necessary and justified by compelling reasons.¹⁷¹ In this regard, Lord Keith in *AG v Guardian Newspapers Ltd (No 2)*¹⁷² found that the damage to the public interest involved in a publication of damaging materials, such as procured by Peter Wright and published in his book the '*Spycatcher*', outweighs all other considerations. Therefore, if the importance of the right is taken seriously, any legislative restriction should be narrowly interpreted. Restriction should be placed only when there is a clear and present danger such as in situations below.

2.4.1 NATIONAL SECURITY

National security is one of the exceptions that can limit freedom of expression in the UK. This interest is vital in preserving the well being of the nation as a whole particularly in times of emergency. In this context, Lord Denning described the value of the interest by

¹⁶⁸ [1969] 2 QB 375.

¹⁶⁹ Ibid, 391.

¹⁷⁰ [2002] EWCA 1373, para 41.

¹⁷¹ *R v Secretary of State, ex p Simms* [1999] 3 All ER 400, 407.

¹⁷² *AG v Guardian Newspapers Ltd (No 2)* [1990 1 AC 109.

saying that ‘even natural justice must take a back seat’.¹⁷³ The issue of national security is considered by the court in *AG v Guardian Newspapers Ltd.*¹⁷⁴ The main issue in this case was the legitimacy of injunctions granted to restrain newspapers from publishing information about the British security services which was derived from the manuscript of a proposed book written by a former secret intelligence officer. The government’s argument was that Peter Wright was bound by a lifelong duty of confidentiality and breach of this duty ought to be restrained by an injunction. This is to maintain the public interest in the national security. The court found that the nature of the materials received in confidence could be damaging to the security service. The House of Lords upheld the interlocutory injunctions against the three UK newspapers; The Observer, The Guardian and The Sunday Times.

This case shows that, there is a necessity to limit freedom of expression on the ground of national security.¹⁷⁵ Another such concern is the impact it has on the public interest and the well being of the nation in a democratic society.¹⁷⁶ Restriction on freedom of expression is, thus, necessary to avoid serious and irreparable consequences to national security.

In addition, combating terrorism is an important public interest.¹⁷⁷ The tragedy of September 11 in the United States illustrates the needs to prioritise national security over personal liberty. Nonetheless, the restriction should be subjected to scrutiny such as under proportionality. The grave impact of terrorism on national security legitimises the suspension of personal liberty. In the UK, the government has introduced the Anti-Terrorism, Crime and Security Act 2001, which empower detention without trial of suspected international terrorists.¹⁷⁸ However, the controversial aspect of the 2001 Act is that it provides a distinct course of action, which discriminates against suspected international terrorists. They are allowed to leave the country on their own accord or face

¹⁷³ *R v Secretary of State for the Home Department, ex p Hosenball* [1977] 3 All ER 452, 457.

¹⁷⁴ [1987] 1 WLR 1248.

¹⁷⁵ Bailey, S.H. et al (1991) *Civil Liberties: Cases and Materials*. London, 446.

¹⁷⁶ See per Lord Donaldson MR in *R v Secretary of State for the Home Department, ex parte Cheblak* [1991] 2 All ER 319, 334.

¹⁷⁷ *R v Secretary of State for Home Department, ex parte Brind* [1992] 1 All ER 720.

¹⁷⁸ Section 23 of the Anti-Terrorism, Crime and Security Act 2001.

imprisonment. It is argued that if the Home Secretary is satisfied with their involvement in terrorism activities that warrant their arrest, they should not be given a choice to leave in the first place.

National security is within the executive domain.¹⁷⁹ The government has a wide power to decide the nature of national security and activities that pose a threat to such security. Decisions on security matters at national level have received a wide margin of appreciation under the European Convention.¹⁸⁰ This is because the courts have no expertise when it comes to questions of national security. Both the domestic courts and the ECtHR recognise that decisions of the legislature and the executive are entitled to a high level of deference. The courts appreciate that action often has to be taken on a matter of urgency.¹⁸¹ Simon Brown LJ pointed that ‘the very words “national security” have acquired over the years an almost mystical significance. The mere incantation of the phrase itself instantly discourages the court from satisfactorily fulfilling its normal role of deciding where the balance of public interest lies’.¹⁸²

Besides the employment of legal mechanism, extra-legal mechanism such as the Defence Advisory notice system (DA notice), previously known as the D notice, also affects the exercise of freedom of expression in the UK. It creates a practice of self-censorship by the press.¹⁸³ The system relates to certain information that the government considers sensitive on the ground of national security.¹⁸⁴ It requires the press to refrain from publishing it. However, the effectiveness of this system requires co-cooperation from the press.

The practice of the DA notice does mean that the public is prevented from questioning the conduct of security services. This is so when Lord Nicholls in *AG v Punch Ltd*¹⁸⁵

¹⁷⁹ *The Zamora* (1916) 2 AC 77.

¹⁸⁰ *Brind and McLaughlin v United Kingdom* (1994) 18 EHRR CD 76. See also *Vogt v Germany* (1995) 21 EHRR 205.

¹⁸¹ *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153. *Leander v Sweden* (1987) 9 EHRR 433.

¹⁸² Brown, S. Public Interest Immunity (1994) *PL* 579, 589.

¹⁸³ Bailey, op.cit., n. 171, 404.

¹⁸⁴ House of Commons Defence Committee 3rd Report, 1979-80; The D-Notice System, H.C. 773.

¹⁸⁵ [2003] HRLR 14.

recognises that security service is not entitled to immunity from criticism. The public has a right to know of incompetence in the service as in any other government department. However, reliance on national security in limiting the right can be scrutinised by the requirement that restrictions must be 'necessary in a democratic society'. The claim of national security should not be accepted without question. Otherwise it can be used to inhibit freedom of expression, which includes the right to impart information without interference, by public authority.

Another urgent situation that qualifies the freedom of expression in the UK is in relation to secret information. The Official Secrets Act 1989 restrains all kind of information relating to security and intelligence services from public disclosure. Under the Act information is linked to the position of a person rather than to the nature of the information. Even if the information no longer poses threat or harm to national security, it is still protected under the Act. This is because of the indefinite restraint on disclosure and the absence of time limit for the purpose of lifting up the restraint. In this context, the use of the Official Secrets Act 1989 to prevent disclosure of information is inconsistent with the right to receive and impart information.

Arguably, the restraint of information under the above situation does not meet the proportionality test that specifies a number of requirements.¹⁸⁶ Sedley J in *R v Secretary of State for the Home Department ex parte McQuillan*,¹⁸⁷ explained that not all national security considerations are necessarily of the same weight and importance. The proportionality test requires the government to show a pressing social need in a democratic society.¹⁸⁸ Information which is no longer a threat or harmless to national security due to change of event or time factor, thus, should not be suppressed. Suppression of information in such a manner would bolster a culture of secrecy.¹⁸⁹ It thwarts free flow of information that is useful to the public in forming their judgment particularly in relation to matters pertaining to their interest.

¹⁸⁶ Alder, J. (2002) *General Principles of Constitutional and Administrative Law*. Houndmills, 565.

¹⁸⁷ [1995] 4 All ER 540.

¹⁸⁸ *R v Shayler* [2003] 1 AC 247.

¹⁸⁹ Whitty, N et al (2001) *Civil Liberties: The Human Rights Act Era*. London, 360.

In addition, the Act can be used to intimidate a person from disclosing classified security information. For instance, the Act was used against Katherine Gun, a translator in GCHQ. She was accused of disclosing a request allegedly from a US national security agency official for help from British intelligence to tap the telephones of UN Security Council delegates during the period of fraught diplomacy before the war.¹⁹⁰ It can also be a tool to withhold embarrassing information and malpractices in the government from being exposed.¹⁹¹ This is inconsistent with the commitment as proclaimed by the government towards freedom of information where ‘the traditional culture of secrecy will only be broken down by giving people in the United Kingdom the legal right to know’.¹⁹² In this regard, Judge LJ in *R v Central Criminal Court, ex p Bright*¹⁹³ stated that:

Inconvenient or embarrassing revelations, whether for the security services or for public authorities should not be suppressed...When a genuine investigation into possible corrupt or reprehensible activities by a public authority is being investigated by the media, compelling evidence would normally be needed to demonstrate that the public interest will be served by such proceeding.¹⁹⁴

The application of the Act to prevent whistle-blowing involving information that exposes malpractices is undemocratic. It is a matter of public interest for the people to receive information relating to a government that ought to be accountable. The Act was also used against Tony Geraghty, an author and journalist; in connection with his book *The Irish War*. He was arrested under the Official Secrets Act 1989, his home was searched and he was locked in a cell of a local police station before they questioned him.¹⁹⁵ Both cases, Geraghty and Gun, collapsed after the prosecutor offered no evidence. But the effect of intimidation and hardship may deter a person from divulging information classified as security information.

¹⁹⁰ GCHQ whistleblower cleared. *The Guardian*, 25 February 2004.

<http://www.guardian.co.uk/Iraq/Story/0,2763,1155681,00.html>

¹⁹¹ Robertson, G. and Nicol, A. (2002) *Media Law*. London, 554.

¹⁹² Your Right to Know: Freedom of information. Cm.3818, 1997.

¹⁹³ [2001] 1 WLR 662. See also *AG v Punch Ltd* [2003] HRLR 14.

¹⁹⁴ *Ibid*, 681.

¹⁹⁵ Select Committee on Armed Forces Minute of Evidence, HC 154-II.

<http://www.parliament.the-stationery-office.co.uk/pa/cm200001/cmselect/cmarmed/154/1021302.htm>

In addition, section 5 of the 1989 Act extends to individuals including journalists. In order for a disclosure to be illegal, it must also be proven (a) that the disclosure was damaging; (b) that the defendant disclosing the information knew or had a reasonable cause to believe, that it would be damaging; and (c) that the defendant disclosing the information knew, or had a reasonable cause to believe, that it was protected against disclosure by the 1989 Act and that it had come into his or her possession as a result of an unauthorised disclosure. Arguably, the press can invoke the prior publication defence to show that further damage from the disclosure could not occur.¹⁹⁶ Another restriction that the press encounters in exercising the freedom of expression is contempt of court.

2.4.2 CONTEMPT OF COURT

The definition of contempt of court is interference with the due administration of justice.¹⁹⁷ The conflict between the administration of justice and freedom of the press in informing the public on issues affecting them is a delicate issue to resolve. The conflict arises between two public interests. On one hand there exists a need to preserve administration of justice to protect public interest, on the other, however, freedom of the press to inform the public will be affected by restraining publication. Though freedom of expression is regarded as the lifeblood in a democratic society, it is not a license to scandalise the courts and bring it to disrepute.

The law of contempt of court impinges on the freedom of the press in two possible situations namely, scandalising the court and prejudicing active legal proceeding.¹⁹⁸ The former involves the publication of information that undermines public confidence in the judicial system, whereas the latter relates to prejudicial impact of publication on proceedings in courts. Public discussion of a case on trial through the media amounts to trial by media, which undermines public confidence in the administration of justice.¹⁹⁹ Exposition and publication of relevant facts may jeopardise the interest of the parties

¹⁹⁶ Whitty, op. cit., n. 185, 361.

¹⁹⁷ *AG v Times Newspapers Ltd* [1974] AC 273, 322.

¹⁹⁸ Clayton, R. and Tomlinson, H. (2001) *Privacy and Freedom of Expression*. Oxford, 131.

¹⁹⁹ Per Lord Reid in *AG v Times Newspapers Ltd* [1974] AC 273, 300.

involved in getting a fair. In *R v Thomson Newspapers Ltd, ex parte AG*²⁰⁰ an article was published containing derogatory remark about the accused. The court held that that the gravity of contempt in relation to pending proceedings depended on the likely prejudice to a fair trial. Since the photograph and words were related to the man's activities in connection with race relations that were involved in his trial, the contempt was very serious.

The law of contempt of court is a temporary embargo on publication of information that would disrupt fair hearing and interfere with administration of justice.²⁰¹ Adverse publicity through press reporting of case on trial invites public reactions that may undermine justice by way of fair hearing. Sensational media coverage is one of the contributing factors that may distract the course of justice. Pre-trial discussion by the media, which amount to substantial risk, that impede and prejudice the course of justice is a contempt of court. The law of contempt of court is governed by the Contempt of Court Act 1981 and common law. The existence of the Contempt of Court Act 1981 is the result of the decision in *Sunday Times v United Kingdom*.²⁰² The court concluded that the restraint on publication of an article regarding the drug 'Thalidomide' failed to satisfy the social need in a democratic society sufficiently pressing to outweigh the public interest in freedom of expression.

Media exposure of a suspect in crime may cause a substantial risk to the administration of justice especially when it involves the revelation of past convictions.²⁰³ Even though this is within the ambit of the law of contempt, the media can be protected by section 5 of the Contempt of Court Act 1981. It provides protection to stories that are a discussion of public affairs as long as the risk of prejudice to a particular case is merely incidental to the wider discussion. Although this provision recognises freedom of expression but it does not make the right prevails over the interest of justice. The element of risk determines the scope of freedom of expression in this context.

²⁰⁰ [1968] 1 WLR 1.

²⁰¹ Robertson, op. cit., n. 187, 346.

²⁰² (1979) 2 EHRR 245. In *AG v Times Newspapers Ltd* [1974] AC 273 the House of Lords restored the injunction to publish the article which had been discharged earlier by the Court of Appeal.

²⁰³ *AG v MGN Ltd* [1997] 1 All ER 456.

An order for disclosure of sources of journalistic information is another kind of restraint on freedom of the press. The press argue that protecting sources of information is a basic tenet of journalistic ethics,²⁰⁴ whilst the courts develop the common law which threatens journalists with imprisonment for withholding their news source. Application for disclosure of source is based on the *Norwich Pharmacal*²⁰⁵ principle where a person through no fault of his own gets mixed up in the wrongful acts of others so as to facilitate their wrongdoing has a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoer. Failure to disclose the source on court order will make the journalists liable for contempt of court. However, section 10 of the Contempt of Court Act 1981 provides for a presumption of necessity in favour of journalists to withhold their source. The provision states:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Although the provision accords protection to source of information, there are four interests that can unveil the confidentiality of the source. The interests are (a) justice, (b) national security, (c) the prevention of disorder and (d) the prevention of crime.

From the discussion on restrictions on freedom of expression so far, there is one common sub-theme relating to institutional design. The discussion reveals that although freedom of expression in the UK is not a priority right, there is, however, a strong indication from the judicial commitment that shows the strength of the freedom of expression in the country.

²⁰⁴ Code 7 of the National Union of Journalists code of conduct states that 'A journalist shall protect confidential sources of information'. See <http://www.nuj.org.uk/inner.php?docid=59>

²⁰⁵ *Norwich Pharmacal Co. v Customs and Excise Commissioners* [1974] AC 133.

2.4.3 JOURNALISTIC SOURCE

The public interest in the role of the press is not merely confined to reporting events and imparting information.²⁰⁶ It has a role in exposing *inter alia*, impropriety and miscarriages of justice. This is part of investigative journalism, which requires protection of source of information. The press enjoys a qualified protection against disclosure of sources under the law of confidentiality.²⁰⁷ Disclosure of journalistic source may jeopardize the function of the press as the ‘watchdog’ for the public because it will deter people from relaying information that may expose their identity. In this regard, Robertson argues that ‘If sources, frightened of exposure and reprisal, decide not to talk, there will not only be less news, but the news which is published will be less reliable. It will not be checked for spin.’²⁰⁸ This is the basis for the contention to justify the privilege not to disclose sources of information.²⁰⁹

However, the courts are reluctant to order disclosure unless there is a necessity to meet a pressing social need. The court in *AG v Clough*²¹⁰ rejected the claim to immunity by a journalist. The approach of the courts, to the link between freedom of the press and a privilege not to disclose sources of information, as pronounced by Lord Wilberforce in *British Steel Corp v Granada Television Ltd*²¹¹ when he said:

A relationship of confidence between a journalist and his source is in no different category...But in all these cases the court may have to determine, in particular circumstances, that the interest in preserving this confidence is outweighed by other interests to which the law attaches importance.²¹²

Protection of journalistic sources is vital and is a facet of freedom of the press. This is emphasised by the court in *Interbrew SA v Financial Times Ltd*.²¹³ The main issue in this case is whether the public interest in identifying the source was sufficiently compelling to

²⁰⁶ *Secretary of State for Defence v Guardian Newspapers* [1985] AC 339.

²⁰⁷ Toulson, R. G. and Phipps, C. M. (1996) *Confidentiality*. London, 165.

²⁰⁸ Robertson, op. cit., n. 187, 255.

²⁰⁹ The Supreme Court of Canada doubted the argument that there will be a ‘drying-up’ of news sources in case of failure to extend testimonial privilege to journalists. See *Moysa v Alberta (Labour Relations Board)* (1989) 60 DLR 1.

²¹⁰ [1963] 1 QB 773.

²¹¹ [1981] AC 1096.

²¹² Ibid, 1168.

²¹³ [2002] EMLR 24.

override the public interest in protecting the media's sources of information. The court found that there was an overriding need for the disclosure sought in the interest of justice²¹⁴ and for the prevention of crime. The act of altering highly confidential information by inserting false market sensitive information in order to create a false market in the shares was a serious criminal offence. The court also concluded that a real risk of repetition exists if the source is not identified.

Plainly, there is a close association between the protection of sources and press freedom. The court in *Mersey Care NHS Trust v Ackroyd* made this point.²¹⁵ The court acknowledges that protection of journalist's source is a basic condition of freedom of the press. However, the disclosure of the source had to be justified by the claimant by an overriding requirement in the public interest, amounting to a pressing social need, to which the need to keep sources confidential should give way. In this case the Mirror published an article containing extract from medical record of a patient kept by the claimant. The claimant sought disclosure of the journalist's source. The court held that although there was a clear public interest in preserving the confidentiality of medical records that alone could not automatically be regarded as sufficient to override the protection due to journalistic sources given by Art.10 of the European Convention. It would be an exceptional case if a journalist was ordered to disclose the identity of his source without the facts of his case being fully examined.

In contrast, the court in *Ashworth Hospital Authority v MGN*²¹⁶ applied the decision in *Goodwin v United Kingdom*²¹⁷ where the necessity for any restriction of freedom of expression had to be convincingly established. In particular, limitations on the confidentiality of journalistic sources called for the most careful scrutiny by the court. Accordingly, disclosure should only be ordered to meet a pressing social need and when it is proportionate to a legitimate aim. The court held that the care of patients at Ashworth was fraught with difficulty and danger. The disclosure of the patients' records increased

²¹⁴ The interest of justice means interest that is justiciable. See per Sedley LJ in [2002] EMLR 24, para 84. See also *X Ltd v Morgan-Grampian* [1991] 1 AC 1, 44.

²¹⁵ [2003] EMLR 36.

²¹⁶ [2002] UKHL 29. See also *John v Express Newspapers Ltd* [2000] EMLR 606.

²¹⁷ (1996) 22 EHRR 123.

the level of the difficulty and danger. To deter a similar wrongdoing in the future, it was essential that the source be identified and punished. Accordingly the order for disclosure was necessary and proportionate.

It appears from the cases above that the courts, as independent institutions, play a vital role in ensuring the exercise of freedom of expression. The courts could scrutinise restrictions on the freedom by narrowing the scope of limit under the requirement of pressing social need and proportionate to the legitimate aim.

2.4.4 INFLAMMATORY SPEECH

Freedom of expression in a democratic society is not confined to favorable and inoffensive speech. It also covers speech that is offensive, shocking or disturbing.²¹⁸ Nevertheless, unregulated expression may have a negative implication prejudicial to social harmony in a plural democratic society. This is apparent in the case of inflammatory speech, which is a ground for restricting freedom of expression.

Inflammatory speech was an issue the court has to decide in *Thomas v News Group Newspapers Ltd.*²¹⁹ In this case the article published by the defendant referred to the claimant as a "black clerk" and incited racial hatred against the claimant. The claimant alleged that she had received a number of racist hate letters as a result of the articles and that the articles had caused her to be terrified and scared to go to work. The claimant claimed damages under section 3 the Protection from Harassment Act 1997. The court, in dismissing the appeal from the defendant, found that the claimant had an arguable case, that the defendants harassed her by publishing racist criticism of her which was foreseeable likely to stimulate a racist reaction on the part of their readers and cause her distress. In reaching his decision Lord Phillips applied the test that requires the publisher to consider whether a proposed series of articles, which is likely to cause distress to an individual, will constitute an abuse of the freedom of press, which the pressing social needs of a democratic society require, should be curbed.

²¹⁸ *Jersild v Denmark* (1995) 19 EHRR 1. *Nilsen and Johnsen v Norway* (2000) 30 EHRR 878.

²¹⁹ [2002] EMLR 4.

Publishing material likely to incite racial hatred is an offence in the United Kingdom under the Public Order Act 1986. According to section 17 of the Act racial hatred means that hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins. Section 5 of the Public Order Act 1986 makes a person guilty of an offence if he:

- a- uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
- b- displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

The approach adopted by Parliament in the case of racial hatred has now been applied more broadly. Part 5 of the Anti-Terrorism, Crime and Security Act 2001 which came into force on 14th December 2001 created new offences; 'religiously' aggravated assault, criminal damage, public order and harassment. The Act amended Part 2 of the Crime and Disorder Act 1988 so that the existing offences under Sections 29 to 32 of the 1988 Act described as 'racially aggravated' are committed if they are aggravated by either racial or religious hostility. This development shows that the wider public and communal interest is more important than individualism in a liberal society.

Furthermore, inflammatory speech contributes to the eruption of racial riot in Oldham and Burnley in May and June 2001.²²⁰ The effect of this type of speech is harmful to public goods particularly when it causes public disorder and disintegrates the plural society. The effect of such a speech was considered by Blackstone in his Commentaries on the Laws of England when he said 'to punish...any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundation of civil society'.²²¹ Arguably, the impact of inflammatory speech may present a justifiable reason to limit freedom of expression.²²²

²²⁰ Harris, P. Oldham, capital of racial tension. *Observer*, 10 June 2001

http://observer.guardian.co.uk/uk_news/story/0,6903,504478,00.html

²²¹ Blackstone, W. (1826) *Commentaries on the Laws of England*. London, 152.

²²² Dworkin, R. (1977) *Taking Rights Seriously*. London, Duckworth.

In this regard, Mill suggests that limitation on freedom of expression is necessary to regulate the action and words of members of a political community based on the harm principle. According to him ‘the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others’.²²³ Harm is an intrusion into an interest that a person has. Feinberg argues that harm constitutes a wrongful and unexcused invasion of interest.²²⁴ An interest is something in which one has a stake. The risk to someone’s stake provides the reason for objecting harmful conduct. Freedom of expression can be classified as a welfare interest that is ranked the highest on account of Feinberg’s harm principle.²²⁵ It is only when speech causes a direct and clear violation of rights that it can be limited. The application of the harm principles permits few sanctions on the exercise of freedom of expression. This is because it requires a demonstrable link between speech in question and direct harm to others.

On the other hand, inhibition of freedom of expression based on offence²²⁶ ought to be wider. This is because it covers all offensive form of speech. Moreover, offence is difficult to be determined objectively in a plural society. Thus, the uncertainty of offence renders it an improbable principle in ascertaining the scope of freedom of expression. This is because it would extent the inhibition on freedom of expression based on taste rather than fact. What might be an offensive subject to one group may not be so to the others. For instance, to wear a Nazi’s uniform with swastika in the UK may be an insensitive and offensive conduct to certain groups of people. But to restrict such conduct would be a step too far in a liberal society. The court in *DPP v Percy* deals with such a conduct.²²⁷ This case involved an expressive act of defacing American flag. The district judge found that there was a social need to prevent the denigration of objects of veneration and symbolic importance for one cultural group. However, on appeal the court held that the conviction had not been compatible with the right to freedom of

²²³ Gray, J. (1991) *John Stuart Mill on Liberty and Other Essays*. Oxford, 14.

²²⁴ Feinberg, J. (1984) *Harm to Others*. Oxford, 105.

²²⁵ Ibid, 42.

²²⁶ Feinberg, J. (1985) *Offense to Others: The Moral Limits of the Criminal Law*. Oxford, Oxford University Press.

²²⁷ [2001] EWHC 1125.

expression. A similar line of argument can be extended to the next discussion on whether obscenity is offensive or harmful.

2.4.5 OBSCENITY

Obscenity and sexually related matters are also regarded as reasons for proscribing freedom of expression.²²⁸ In the UK, the Obscene Publication Act 1959 criminalises the publication of obscene materials if it is 'such as to tend to deprave and corrupt persons who are likely, having regard to all the circumstances, to read, see or hear the matter...'.²²⁹ However, section 4 of the Act provides exception where the publication is justified for the public good on the ground that it is in the interests of science, literature, art or learning. The public good justification predicates plural values where a benefit to wider interest is more important than the negative effect to individuals.

Reliance on the 'deprave and corrupt' test is a subjective standard which depends on the end users rather than ordinary people in general.²³⁰ It has been given a narrow interpretation by the court in *R v Anderson*.²³¹ In this case the appellants, the editors and publishing company of a magazine which contained some items relating to lesbianism, homosexuality, oral sexual intercourse and drug taking, were indicted on counts of conspiracy to corrupt public morals in producing a magazine containing obscene items with intent to corrupt young persons, of publishing and having for gain an obscene article contrary to section 2 of the Obscene Publications Act 1959. The appellants also were charged with enclosing an indecent or obscene article in a postal packet contrary to section 11 of the Post Office Act 1953. The court did not agree with the view that the meaning of obscene includes repulsive, filthy, loathsome or lewd. In a related case *R v Richard Clive Neville*²³² the judge stressed that 'for the purpose of that Act "obscene" means, and means only, a tendency to deprave or corrupt'. Thus, the scope of obscenity

²²⁸ Indecent Displays (Control) Act 1981, Protection of Children Act 1978, Theatre Act 1968 and Broadcasting Act 1990.

²²⁹ Section 1 (1) Obscene Publications Act 1959. See *R v Hicklin* (1868) LR 3 QB 360.

²³⁰ Barent, E. (1985) *Freedom of Speech*. Oxford: 256. See also Robertson, G. and Nicol, A. (2002) *Media Law*. London, 157.

²³¹ [1971] 3 All ER 1152.

²³² [1971] 56 Cr. App. R. 115.

is narrow so that some publications, though sexually explicit, do not necessarily amount to obscenity.

The objective of prohibiting obscene publications is to protect society from moral decadence. The conundrum of this prohibition is the difficulty to set a moral standard especially in a liberal pluralist society.²³³ The conditions of such a society make it incomprehensible to adopt a moral standard based on cultural, religious and ethnic factors of certain part of society. Nevertheless, contemporary societal values to a certain extent play a role in drawing the standard of morality. In relation to obscenity, this can be expressed through the finding of the jury whose function is to consider whether a publication is obscene or not.²³⁴ The court in *R v Martin Secker Warburg Ltd*²³⁵ held that in deciding whether the book had the tendency to corrupt and deprave those into whose hand it might fall, the jury had to consider whether or not the book sought to present a fair picture of aspect of the contemporary American thought in relation to the problem, whether or not it is desirable that on this side of the Atlantic we should close our eyes on the facts because we did not find them altogether palatable.

The latitude on obscenity as discerned from the above discussion shows that the UK may be more receptive to sexually explicit materials that are prohibited in other society such as in Malaysia. This could be illustrated by the publication of photographs of semi-naked women in tabloid newspapers and the relaxed attitude towards distribution of sexually explicit publications, which are accessible by the public in the UK. This study argues that there is a public interest in maintaining certain basic moral standard to preserve human dignity. Furthermore, the effect on human dignity in term of harm on decent people by way of depravity and moral corruption, in contrast with shocking or disgusting,²³⁶ necessitate the inhibition of freedom of expression in this area.²³⁷

²³³ Feldman, D. (2002) *Civil Liberties and Human Rights in England and Wales*. Oxford, 923.

²³⁴ See *R v Calder and Boyars Ltd* [1969] 1 QB 151.

²³⁵ [1954] 2 All ER 683.

²³⁶ The corrosive effect of deprave and corrupt is more than shock and disgust. See Robertson, op. cit., n. 226, 159.

²³⁷ Home Office Departmental Committee on Obscenity and Film Censorship. 1979 Cmnd. 7772

Obscenity disturbs Muslims and Roman Catholics alike. On this premise, there is a basis to proceed into the next area of concern.

2.4.6 BLASPHEMY

Blasphemy is another area that has an impact on the exercise of freedom of expression. It is regarded as an unnecessary impediment on the right to freedom of expression.²³⁸ The law on blasphemy concerns scurrilous vilification and insulting attack on religion.²³⁹ The nature of the law of blasphemy is under scrutiny when there are several attempts to abolish it.

In 1979 there was an attempt to abolish the offence on the ground that the law is not relevant in modern society. However, the House of Lords rejected the proposal fearing that it could open the gate for blasphemous publication.²⁴⁰ In 1986, the Law Commission produced a report on law of blasphemy where the majority of the Commission opined that a reformed law of blasphemy is irrelevant and serves no useful purpose to modern society. However, Lord Scarman disagreed when he argues that there is a need to respect and protect different religious beliefs in plural society.²⁴¹

In the UK, blasphemous expression is applicable only to Christian faith.²⁴² The court in the case of *ex* affirms this. *parte Choudhury*²⁴³ when it upheld the application of the law of blasphemy to Christianity. The court refused to extend the law to other religion because of 'insuperable problems and would be likely to do more harm than good.' The court's finding is unconvincing. Perhaps the fear of cross-religious blasphemy is misplaced if blasphemy is confined to the believers of the same faith. A person of another faith should not use the law against sacrilegious attack. Other appropriate law dealing with public order in particular racial and religious aggravated offence can deal

²³⁸ Elias, P. and Coppel, J. (2000) *Freedom of Expression and Freedom of Religion: Some Thoughts on the Glen Hoddle case*. In Beatson, J. and Cripps, Y. (eds.) *Freedom of Expression and Freedom of Information*. Oxford, 54.

²³⁹ See per Lord Scarman in *R v Lemon* [1979] 1 All ER 898.

²⁴⁰ H.L. Deb, 1978, vol. 389, cols 279-350.

²⁴¹ *Whitehouse v Gay News Ltd* [1979] AC 617.

²⁴² There was support for the view that it should be extended to other religion. See H.L. Deb, 1978, vol. 389, cols 311, 315.

²⁴³ *R v Bow Street Magistrates' Court, ex p. Choudhury* [1991] 1 All ER 306.

with any such attack.²⁴⁴ In addition, the confinement of the law of blasphemy to one faith is inconsistent with the notion of equality before the law.

The backdrop of British society, where the practice of a variety of religious faiths is acceptable, reveals the crudity of the notion of dominant judeo-Christianity faith. It is difficult to defend the confinement of blasphemy to Christianity when the existence and practice of other religions are given due recognition. There is an inconsistency when religious practices are respected²⁴⁵ and to a certain extent accorded legal protection, but the sanctity of the religion is denied protection.

The law of blasphemy is relevant only if religion is a sanctified part and parcel of an individual life. The special feelings that people hold about religion could make an offence of blasphemy as necessary.²⁴⁶ However, in modern secular society where liberal values such as individualism are revered, the application of law of blasphemy against people is unlikely.²⁴⁷

Even though the law is still in existence, the application is subdued. Legal action on the ground of blasphemy is a rarity.²⁴⁸ The most recent is the case of *Whitehouse v Lemon*.²⁴⁹ This case involved a poem about a homosexual's conversion to Christianity, which metaphorically attributed homosexual acts to Jesus Christ. The House of Lords upheld the conviction and ruled that the publisher's intentions were irrelevant, and that there was no need for the prosecution to prove any risk of breach of the peace.

A margin of appreciation is accorded to the state in relation to inhibition of freedom of expression in this matter. In *Wingrove v United Kingdom*,²⁵⁰ the British Board of Film refused a film portrayed highly erotic scenes purporting to represent the visions of Saint Teresa on the grounds that it was blasphemous. The main contention was that the government could not provide a justification under Article 10 (2). The court held that the

²⁴⁴ *Redmond-Bate v DPP* [1997] 7 BHRC 375.

²⁴⁵ For instance, Muslims children are allowed to wear religious attire to school in the UK.

²⁴⁶ The Law Commission's Working Paper No.79: Offences against Religion and Public Worship, 1981.

²⁴⁷ Robilliard, J. A. (1984) *Religion and the Law*. Manchester, 41.

²⁴⁸ Robertson, op. cit., n. 226, 211.

²⁴⁹ [1978] 68 Cr. App. R. 381.

²⁵⁰ (1997) 24 EHRR 1. See also *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34.

law passed the test of being ‘prescribed by law’ despite the consideration that there was ambiguity regarding the nature of blasphemy.²⁵¹ The authorities were given a degree of flexibility in determining whether or not the facts of any given case fell within the scope of blasphemy. The court recognised that state authorities would have a wider margin of appreciation when regulating freedom of expression in relation to matters that were liable to offend personal belief.²⁵²

On the other hand, the ambiguity of the law of blasphemy poses a chilling effect on the right to freedom of expression where delineation of criticism and insulting religion is unclear.²⁵³ Robilliard argues that ‘In practice it is an impossible task to prove offence, as it is too hard for the jury to put themselves in the position of a reasonable member of the particular religion defamed...’²⁵⁴

The effort to accommodate competing interests as discussed above is also a feature of defamation law, which is the next focus of discussion.

2.4.7 DEFAMATION

Defamation is another area that has a direct impact on freedom of expression. It concerns a ‘defamatory statement which injures the reputation of another by exposing him to hatred, contempt or ridicule, or which tends to lower him in the esteem of right-thinking members of society.’²⁵⁵

In relation to this, the media, particularly the press, is under constraint due to the unpredictability of the law on defamation. The unpredictability with regards to defamatory assertion, reputation, burden of proof and damages, put the press under constraint in publishing statement that may expose them to legal proceedings for libel. For instance, there is the uncertainty of the definitive meaning ‘right-thinking’ members of society. To associate the test to a class of society is difficult in a modern pluralistic

²⁵¹ Ibid, para. 42

²⁵² Ibid, para. 58.

²⁵³ Kearns, P. Obscene and Blasphemous Libel: Misunderstanding Art. (2000) 15 *Crim.LR* 652.

²⁵⁴ Robilliard, op. cit., supra, 37.

²⁵⁵ Deakin, S. et al (2003) *Tort Law*, 5th ed. Oxford, 645.

society.²⁵⁶ This may lead to self-censorship in the disclosure of information that is inconsistent with the idea of freedom of expression.

Moreover, the readiness of the courts to protect personal reputation even without the proof of actual damage affects the press in having to pay substantial damages to compensate the plaintiff for the presumed injury to reputation. In *John v Mirror Group Newspapers*²⁵⁷ the Court of Appeal reduced the quantum of damages award for the false report in the Sunday Mirror on the plaintiff's eating disorder. The court awarded damages even when there is no evidence of actual harm to his reputation as an entertainer.

The House of Lords in *Morgan v Odhams Press Ltd*²⁵⁸ ruled that there is no need for the plaintiff to prove damage. Yet, he may recover substantial damages even if there is no one unlikely to believe the allegations. Lord Reid said that:

It is true that X's reputation is not diminished but the person defamed suffers annoyance or worse when he learns that a defamatory statement has been published about him.²⁵⁹

The presumption of damage shows the protective attitude of the courts in preserving personal reputation. However, it is a disadvantage to the press when they are liable even in the absence of evidence of injury to reputation or personal integrity.²⁶⁰ Hence, the existing law is an unfair restriction on freedom of expression. This has serious implications for investigative journalists²⁶¹ who want to expose fraud, corruption, hypocrisy and other kinds of secret wrongdoings. On the other hand, it is necessary in a democratic society to curb carelessness and irresponsible publication by the press for the purpose of their commercial interest. At this juncture, Lord Nicholls in *Reynolds v Times Newspapers Ltd*²⁶² remarks that '...the sad reality is that the overall handling of these

²⁵⁶ Ibid, 646.

²⁵⁷ [1996] 2 All ER 35.

²⁵⁸ [1971] 1 WLR 1239.

²⁵⁹ Ibid, 1246.

²⁶⁰ Barendt et al argues that the burden of proving damage should be on the plaintiff. See Barendt, E. et al (1997) *Libel and the Media*. Oxford, 196.

²⁶¹ Lord Nicholls acknowledges investigative journalism as part of the vital role of the press. See *Reynolds v Times Newspapers* [1999] 2 AC 127, 200.

²⁶² Ibid.

matters by the national press, with its own commercial interests to serve, does not always command general confidence.’²⁶³

There is a lack of precision in relation to what amounts to a defamatory statement.²⁶⁴ The courts have formulated three different tests in order to determine whether a statement is defamatory. The tests are based on whether a statement tends to, first, injure the plaintiff’s reputation by exposing to hatred, contempt or ridicule,²⁶⁵ secondly, causes him to be shunned or avoided,²⁶⁶ and thirdly, lowers him in the estimation of right-thinking members of society.²⁶⁷ A broad interpretation of defamatory assertion impinges on the freedom of the press to indulge in news that interest the people. This creates unnecessary difficulty for the press.²⁶⁸ The press also faces difficulty in reporting political information when the House of Lords in *Reynolds v Times Newspapers Ltd*²⁶⁹ refused to include such information as part of the qualified privilege.²⁷⁰ The wide scope of what could be a defamatory statement is perhaps one of the reasons that ‘London is the libel capital of the world’²⁷¹ and promotes ‘Libel tourism’.²⁷²

The changing perceptions of what is acceptable in the society, due to for instance the change of social value, render reliance on right thinking members or ordinary members of society as inconclusive. It creates an assumption that there is a homogeneous society who could reflect on issues in uniformity.²⁷³ In the present plural society engulf with multiculturalism such homogeneity is difficult if not impossible to achieve.

There is a question of value judgment in determining whether statements are capable of being defamatory. The content and context of the whole statement require considerations

²⁶³ Ibid, 202.

²⁶⁴ Milmo, P. et al (2004) *Gatley on Libel and Slander*. 10th ed. London, 8.

²⁶⁵ *Parmiter v Coupland* (1840) 6 M & W 105, 108.

²⁶⁶ *Youssouf v MGM Pictures Ltd* [1934] 50 TLR 581, 587.

²⁶⁷ *Sim v Strach* [1936] 2 All ER 1237, 1240.

²⁶⁸ Barendt, E. What is the Point of Libel Law? (1999) 52 *CLP* 110, 120.

²⁶⁹ [1999] 2 AC 127.

²⁷⁰ Wright (2001) argues that the refusal is a conservatism and inconsistent with the interests of the common convenience and welfare of society. See Wright, J. (2001) *Tort Law and Human Rights*. Oxford, 158-9.

²⁷¹ Robertson, G. and Nicol, A. (2002) *Media Law*. London, 71.

²⁷² Berlins, M. ‘My friend went to London and all I got was a lousy suit’.

http://www.indexlineonline.org/news/20040629_britain.shtml

²⁷³ Barent, op. cit. supra.

from the contemporary social standards point of view. Robertson comments that 'Ideas about immorality and what constitutes dishonourable conduct change over time, but the views of judges change more slowly than most.'²⁷⁴ Previously, an assertion of homosexuality was associated with immorality and dishonourable conduct that makes a person liable for defamation. But the same assertion might not be an issue in defamation in the present social climate due to the change of perception.

Another aspect of defamation law that impedes the freedom of the press is the issue of damages. A large award is a hindrance to freedom of expression. It poses a 'powerful chilling effect on expressive activities'.²⁷⁵ The court in *Rantzen v Mirror Group Newspapers* reviewed the trend of awarding disproportionate damages.²⁷⁶ The court substituted the jury's award to a more modest amount. The power of the court to substitute its own award is given by section 8 of the Courts and Legal Services Act 1990. The court also found that Article 10 of the ECHR requires that damages award in libel actions should not exceed the level 'necessary to compensate the plaintiff and re-establish his reputation'.²⁷⁷

Even though excessive and disproportionate damages are no longer a prominent feature of the law, there is another form of potential threat to free expression in the form of legal cost under the scheme known as 'no win no fee'. Generally 'no win no fee' is used in the context of conditional fee agreements (CFAs). Under such agreements, if a claimant wins his case, he must pay his solicitor's fees and any expenses for items such as experts' reports and barrister's or other solicitor's opinions. On the other hand if he loses, he need not pay any fee to his solicitor. However, he may have to pay his opponent's legal costs and both sides' disbursements.²⁷⁸ The scheme is widely used in personal injury cases to enable poor people to institute legal action.

²⁷⁴ Robertson, op. cit. supra, 80.

²⁷⁵ Mullender, R. (2002) *Freedom of Expression and Competing Private Interests*. In Alder, J. General Principles of Constitutional and Administrative Law. Houndmills, 497.

²⁷⁶ [1993] 4 All ER 975.

²⁷⁷ Ibid, 994.

²⁷⁸ <http://www.dca.gov.uk/confeeagr/faqs.htm>

However, there is concern about the operation of this arrangement in libel cases.²⁷⁹ The nature of the scheme where the press may incur a huge legal cost impinges on the freedom of the press. This is expressed by Lord Justice Brooke in *King v Telegraph Group Ltd*²⁸⁰ when he said it is unfair for the press, the defendants, to pay unreasonable and disproportionate costs in the event they lose and with 'no reasonable prospect of recovering their reasonable and proportionate costs if they win.'²⁸¹ In this case, the appellants asked the Court to make some kind of special order for their protection because the claimant had brought this action under a 'conditional fee agreement' (CFA) without taking out an 'after the event' (ATE) insurance policy. The issue in this case is the appropriateness of arrangements whereby a defendant publisher will be required to pay up to twice the reasonable and proportionate costs of the claimant if he loses or concedes liability, and will almost certainly have to bear his own costs if he wins. The court admitted that such a system is bound to have a chilling effect on a newspaper exercising its right to freedom of expression, and to lead to the danger of self-imposed restraints on publication.²⁸² Nevertheless, the court decided not to interfere with the wish of Parliament that litigants should be able to bring actions to vindicate their reputations under a CFA, and that they should not be obliged to obtain ATE cover before they do so.

Though the Human Rights Act 1998 guarantees the people in the UK freedom of expression as a qualified right, the enjoyment of it is compromised by considerations of cost and associated risks. From the discussions, thus far, it shows that if the UK is a model for freedom of expression but, arguably, it is a far from being a perfect one. This leads to the next discussion relating to press freedom in the UK.

²⁷⁹ Dyer, C. Media groups challenge no-win no-fee libel deals. *The Guardian*, 27 September 2004.
http://www.guardian.co.uk/uk_news/story/0,3604,13

²⁸⁰ [2004] EWCA Civ. 613.

²⁸¹ *Ibid*, para. 101.

²⁸² *Ibid*, para. 99.

2.5 FREEDOM OF THE PRESS

Freedom of the press has been referred to as ‘essential to the nature of a free state’,²⁸³ ‘the great bulwark of liberty’,²⁸⁴ and ‘great national possession’.²⁸⁵ The role of the press as a purveyor of information and public watchdog vindicates the importance of freedom of the press in democratic society.²⁸⁶ This has gained judicial recognition such as in *Francome v Mirror Group Newspapers*.²⁸⁷ In this case, Sir John Donaldson described free media to be ‘an essential foundation of any democracy’. In addition, the press also makes vital contribution in developing democracy by providing factual information needed for people to form balanced and informed judgments.

It has been noted earlier that freedom of expression includes freedom to receive and impart information. In order to ensure free flow of information, freedom of the press is necessary on the ground of public interest. Moreover, the public has the right to receive information that is protected by the Convention.²⁸⁸ In *Gaskin v United Kingdom*²⁸⁹ the government contended that Article 10 does not confer a right to receive information from the State if the State does not wish to provide it. The court held that Article 10 prohibits restriction on a person from receiving information which others may be willing to impart, but does not confer on an individual the right to information which others are not willing to impart. The court in *Lingens v Austria*²⁹⁰ stressed the role of the press to impart information and ideas on political issues just as on those in other areas of public interest. It went on to say that freedom of the press provides the public one of the best means of discovering ideas and attitudes of political leaders.

Freedom of the press is part and parcel of the concept of freedom of expression. Smith argues that the press should acquire a special and privileged position because of the part

²⁸³ Blackstone, W. *Commentaries on the laws of England*, Book IV, 151.

²⁸⁴ Per Lord Denning in *Schering Chemicals v Falkman Ltd* [1982] QB 1.

²⁸⁵ Per Lord Wilberforce in *British Steel Corp. v Granada Television Ltd* [1981] AC 1096, 1168.

²⁸⁶ Smith, A. *The Press, the Courts and the Constitution*. (1999) 52 CLP 126, 129.

²⁸⁷ [1984] 1 WLR 892, 898.

²⁸⁸ *Guerra v Italy* (1998) 4 BHRC 63.

²⁸⁹ (1990) 12 EHRR 36.

²⁹⁰ (1986) 8 EHRR 103, *Jersild v United Kingdom* (1994) 19 EHRR 1, *Fressoz and Roire v France* (1999) 5 BHRC 654.

that it plays in participatory democracy.²⁹¹ But it is implausible to give privilege²⁹² to the press by relying mainly on its contribution to the society; the constructive role in informing, educating, entertaining and representing the public.²⁹³ In this regard, Lord Denning said that:

The freedom of the press is extolled as one of the great bulwarks of liberty. But it is often misunderstood...It does not mean that the press is free to ruin a reputation or to break a confidence, or to pollute the course of justice or to do anything that is unlawful...²⁹⁴

Moreover, to accord a distinct position to the press would amount to giving primacy to freedom of expression. This is incongruent with the provision of section 12 of the Human Rights Act 1998 and Article 10 of the Convention which propagate equality rather than primacy. Brooke LJ lamented that 'right to freedom of expression is not in every case the ace trumps, it is a powerful card to which the courts of this country must always give appropriate respect.'²⁹⁵ Thus, it is safe to say that freedom of the press in the UK is the product of the predominance of the law of the land.

In the UK, prior-restraint, which is restrictions in advance of publication, on the press in term of licensing has long been abolished since 1695.²⁹⁶ This allows the press to operate without the government's control. However, the government can exert pressure and control in other ways such as legislative constraints on media content. Though there is no specific legislation regulating the press, the existence of several statutory laws, such as Official Secret Act 1989, Contempt of Court Act 1981 and Defamation Act 1996, has an impact on the freedom of the press. The application of the laws causes the press to exercise censorship²⁹⁷ to avoid punishment and penalty. Recently, the government expands restraint on inflammatory expression to include religiously aggravated

²⁹¹ Smith, op. cit., n. 284.

²⁹² Gibbons, T. Freedom of the Press: Ownership and Editorial Values. (1996) *PL* 279, 289.

²⁹³ Article 10 (2) of the Convention recognizes the need to restrict freedom of expression in democratic societies.

²⁹⁴ *Schering Chemicals v Falkman Ltd* [1982] QB 1.

²⁹⁵ [2001] 2 WLR 992, para. 94.

²⁹⁶ The House of Commons refused to continue the Licensing Act. See Dicey, A. *Introduction to English Constitutional Law*, 268.

²⁹⁷ Editorial cutting is a form of censorship prior to publication.

expression through the Anti-Terrorism, Crime and Security Act 2001.²⁹⁸ It is unclear as to whether scurrilous attack on any religion comes under the purview of this offence.

The employment of institutional pressure on the press has an impact on press freedom. This is illustrated by the sacking of Piers Morgan as the editor of the Daily Mirror for the publication of photographs allegedly as a proof of the involvement of British army in abusing the prisoners of Iraq war. Such pressure also exists when the BBC terminated Robert Kilroy-Silk as a presenter of chat show over his article in the Sunday Express that is imbued with racial sentiment. Both instances reflect the scope of freedom of expression and press freedom in the UK. Though the government has no power to shut down the press for publishing inflammatory materials or invasive act, it can exert control by regulating the press through legislations.

The abolition of licensing requirement also paves the way for private ownership of the press. Concentration of ownership in the hand of few proprietors such as Lord Beaverbrook, Lord Rothermere and Rupert Murdoch characterized the oligopoly of the British press. The implication of ownership concentration is that it influences the operational aspect of the press.²⁹⁹ For instance, partisan support to political party in term of press coverage and donation is not uncommon. Furthermore, editors are sacked for failure to uphold the aspirations of the owners.³⁰⁰

On the other hand, private ownership provides distinct advantage to press freedom. It creates financially independent press that relies on the market force rather than the government. Economic independence ensures the press to operate freely without governmental control.³⁰¹ However, it does not ensure that the press is free from political pressure. This is because there are certain issues, such as reputation and privacy, which are beyond the market control. Such a pressure propelled the inception of self-regulation of press industry with the establishment of the Press Council.

²⁹⁸ Section 39 of the Anti-Terrorism, Crime and Security Act 2001.

²⁹⁹ Gibbons, T. Freedom of the Press: Ownership and Editorial Values. (1996) *PL* 279.

³⁰⁰ Grant, M. (1990) *The Politics of the British Media*. In Jones, B. (ed.) *Political issues in Britain Today*. Manchester, 60.

³⁰¹ Gibbons, T. (1998) *Regulating the Media*. London, 47. See also Curran, J. (1998) *Newspapers and the Press*. In Briggs, A. and Copley, P. (eds.) *The Media: An Introduction*. Harlow, 88-9.

2.6 PRESS SELF-REGULATION

The importance of a free press as a vital source of public information is widely recognized. Nevertheless, the press can sometimes damage individual's interest in reputation and dignity by publishing untrue or prejudicial materials. The first Royal Commission on the Press scrutinised the conduct of the press and the quality of journalism.³⁰² The Commission proposed the establishment of Press Council³⁰³ that can monitor the conduct of the press through a code of conduct.

The ineffectiveness of the Council as a self-regulatory body led to a recommendation for a statutory complaints tribunal by the Calcutt Committee³⁰⁴. The Council is perceived as a champion for the press rather than protecting the public from the press malpractices.³⁰⁵ Unfair and unethical³⁰⁶ conduct of the press adds to the demands for more statutory control. The threat of substituting regulatory mechanism from self-regulation to statutory was made on several occasions³⁰⁷ due to the inadequacy and ineffectiveness of the present system.

Self-regulation is jealously guarded and supported by the press industries because it provides an assurance against statutory control.³⁰⁸ In addition, it also ensures that the press is able to manage its own affairs without direct control of the government. Perhaps self-regulatory mechanism is workable in the UK because of the concerted effort by the press industries to ensure the competency of the system;³⁰⁹ and the reluctance of the government to regulate the conduct of the press.³¹⁰ This is substantiated with the introduction of section 12 of the Human Rights Act 1998 to safeguard freedom of the press. This is achieved by requiring the courts to have particular regard to journalistic

³⁰²(1949) Cmnd. 7700.

³⁰³ The first Press Council commenced operation in 1953.

³⁰⁴ Report of the Committee on Privacy and Related Matters, HMSO 1990, Cmnd.1102.

³⁰⁵ Robertson, G. and Nicol, A. (2002) *Media Law*. London, 678.

³⁰⁶ *Kay v Robertson* [1991] FSR 62.

³⁰⁷ The second Royal Commission on the Press, Cmnd. 1811, 1962 para.325, the Lord Chancellor's Department Consultation Paper, 1993, the National Heritage Select Committee, 1993 and recently the Culture, Media and Sports Select Committee on Privacy, Cm 5985, 2003.

http://www.culture.gov.uk/creative_industries/QuickLinks/publications

³⁰⁸ Robertson, G. (1983) *People against the Press*. London, 3.

³⁰⁹ The incorporation of Presbof shows the commitment to uphold self-regulation.

³¹⁰ See government's response to the Fifth Report by Select Committee on Privacy.

materials and relevant privacy code.³¹¹ Interim relief should not be granted to restrain publication unless the applicant is 'likely to establish that publication should not be allowed'.³¹² It imposes a burden on the applicant in order to restrict freedom of the press.

The Press Complaints Commission (PCC) was established in 1991 to adjudicate complaints against the infringement of the press code of conduct. It was established after the failure of the previous Press Council in dealing with the press conduct. However, the effectiveness of PCC as a self-regulatory body is under scrutiny.³¹³ The fact that the code of practice is drafted by the newspaper and periodical industry³¹⁴ evinces the dominance of the press. People outside of the industry should involve in drafting the code to portray a degree of neutrality. Without such involvement, the code is perceived as leaning towards protecting the interest of the press.³¹⁵ Furthermore, the influence of the industry members such as the Press Standards Board of Finance³¹⁶ (Pressbof) may not diminish the image of PCC as representing the interest of the press. As such the public may still be skeptical of the ability of the PCC to resolve issues regarding press misconduct.

Although the PCC provides an avenue for dispute resolution involving the press, there is a question of commitment. This is so when the PCC refused to monitor the press for breaches of its code.³¹⁷ Though the code is incorporated into editors and journalists contract of employment,³¹⁸ the PCC has no power to prevent the occurrence of breach of code. It can only remedy the situation after the event.

In addition, there is also a question of inconsistency in its adjudication. This can be illustrated in two decisions of the PCC involving *Anna Ford* and *J K Rowling*³¹⁹ relating to issue of reasonable expectation of privacy. The PCC dismissed a complaint by Anna

³¹¹ At present, the only code relates to privacy is the PCC's code of practice.

³¹² Section 12 (3) of the Human Right Acts 1998.

³¹³ Calcutt, D. (1993) Review of Press Self Regulation.

³¹⁴ The code binds all national and regional newspapers and magazines. <http://www.pcc.org.uk/cop/cop.asp>

³¹⁵ See comment by Peter Crawford, a lawyer in Amanda Holden case. Reported by in Byrne, C. 'Treat celebrities normally', says lawyer. *The Guardian*, 10 February 2003.
<http://media.guardian.co.uk/pressprivacy/story>

³¹⁶ The financial contribution by the press industries to Pressbof enables the PCC to operate as self regulatory body.

³¹⁷ Robertson, op. cit., n. 301, 683.

³¹⁸ Introduction to the Code of Practice. <http://www.pcc.org.uk/cop/intro.html>

³¹⁹ <http://www.pcc.org.uk/reports/adjudsearch.asp>

Ford on the ground that there was no reasonable expectation of privacy because the beach is publicly accessible though it is secluded. In contrast, the PCC upheld a complaint by Rowling, even though OK! Magazine had submitted evidence that all beaches in Mauritius were public by law, and had cited the PCC decision concerning Anna Ford. Nevertheless, the PCC accepted that other holiday apartments did not overlook the beach and that the family had deliberately chosen low season to avoid unwanted attention.

Furthermore, the adjudicatory power of the PCC is focused on settling disputes. The PCC has no compensatory power to award damages, to order an apology and to award costs. The press can take advantage of repeating unethical conducts by using the complaint to the PCC to re-publicizing the breach.³²⁰ The lack of power to sanction is a handicap that contributes to the lack of credibility³²¹ of the commission. An apology by the press is not a satisfactory redress for irrecoverable loss of privacy nor is it a satisfactory deterrent.³²²

On the other hand, empowering the PCC with such power would undermine the foundation of self-regulation that is based on voluntary participation. It would involve an element of coercion 'savouring more of governmental control'.³²³ Arguably, such a power is necessary to avoid the PCC being turned into a sanctuary for unfair and unethical conduct of the press. The interest of the press, particularly through tabloid journalism, in the personal affairs of public figures,³²⁴ royal families³²⁵ and celebrities raises concerns that the press has gone beyond legal limit by invading privacy and reputation. In this context, the court in *Francome v Mirror Group Newspapers*³²⁶ observed that 'the media is peculiarly vulnerable to the error of confusing the public interest with their own interest.' Press coverage on personal affairs is a form of

³²⁰ Cloonan, M. *Regulating the Press: The Calcutt Reports*. University of York.
<http://www.york.ac.uk/depts/poli/currentug/syh/cs012.yrk>

³²¹ Feldman, D. (2002) *Civil Liberties and Human Rights*. Oxford, 815.

³²² Dworkin, G. *Privacy and the Press*. (1961) 24 *MLR* 185, 187.

³²³ Munro, C. *Self-regulation in the Media*. (1997) *PL* 6, 16.

³²⁴ In 1992, the press exposed embarrassing private affairs involving the Liberal Democrat leader Paddy Ashdown and Secretary of State for National Heritage David Mellor.

³²⁵ In 1991, the People, a tabloid press, published photographs of Princess Eugenie running naked in the garden of her home.

³²⁶ [1984] 1 *WLR* 892.

capitalization of news as commodities for commercial gains.³²⁷ In this relation, Hoffman LJ said:

Newspapers are sometimes irresponsible and their motives in a market economy cannot to be unalloyed by considerations of commercial advantage.³²⁸

On the other hand, the scope of public interest as contained in the PCC code of practice is wide enough to vindicate investigative journalism into the affairs of others. On this point Gibbons argues that ‘Stories about the Royal Family can be justified because it is a public institution. Stories about hypocrisy by public figures can be justified because they reveal the way that the public is being deceived.’³²⁹ However, there are situations where there is no objective public interest in revealing private information and personal affairs of public figures. For instance, the publication of naked pictures of celebrities³³⁰ does not serve any public interest except to increase circulation of newspapers by serving the prurient and prudish interest of the society.³³¹

The problem of self-regulation mechanism under PCC is not with its applicability but rather more on its effectiveness. Although PCC is a self-regulatory body supported by the press industry, it does not mean that the PCC is willing to dictate the press. The Commission is reluctant to specify the requirement that adjudication should be published with ‘due prominence’. The PCC leaves determination on this matter to the editors’ interpretation.³³² The influence of the press industry over PCC is a stumbling block in liberalising the PCC to become an independent body in its true sense. However, the press naturally would want the body they voluntarily support and pay for to see things from their perspective as well.

³²⁷ The entrepreneurship objectives of the press often overshadow their idealistic role. See Tierney, S. Press Freedom and Public Interest: The Developing Jurisprudence of the European Court of Human Rights. (1998) 4 EHRLR 419.

³²⁸ *R v Central Independence Television plc* [1994] 3 All ER 641, 202.

³²⁹ Gibbons, T. (1998) *Regulating the Media*. London, Sweet and Maxwell.

³³⁰ Amanda Holden, an actress, was pictured topless and received settlement from the Daily Star. Sara Cox, a radio DJ, was pictured nude on honeymoon also receive settlement from the People.

³³¹ Robertson, G. (1993) *Freedom, the Individual and the Law*. London, 104.

³³² Appendix 1- The PCC. Replies to the Committee’s Fifth Report 2002-03. HC 213.
<http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmcomeds/213/213.pdf>

2.7 CONCLUSION

Traditionally, the UK law has been strongly protective over individual rights such as reputation at the expense of freedom of expression. The residual character does not entitle the people to claim the right. However, the Human Rights Act 1998 institutionalised freedom of expression to the extent that the Act gives greater protection to free expression as a guaranteed fundamental right. Though the Human Rights Act 1998 does not prioritize freedom of expression, it has however acquired primacy status through judicial commitment in protecting the right.

On the other hand, the emergence of a pluralistic society calls for accommodation of interests. Uneasy compromise occurs which sometimes suppress freedom of expression out of concern for other interests of higher importance such as security and public order. This is a matter of exercising practical choice that is undoubtedly difficult especially for the ruling government. However, institutional protection of freedom of expression in the UK is the fortress for the people to seek refuge in case of infringement of their fundamental rights. It could be arguably said that there are three factors that enable the enjoyment of free expression in the UK. First is the impact of the Human Rights Act 1998, which creates a right-based scheme. Second is the influence of the European Convention on Human Rights in according leverage on freedom of expression under the protective Article 10, and third is the commitment of the judiciary in protecting the right to free expression by giving effect to the right as embedded in the statutory provision.

In this regard, the leverage on free expression as enjoyed in the UK may not be of the same degree in Malaysia. Though Malaysia practices a right-based scheme under the written constitutional provision, other expedient and necessary overriding interests dictate the commitment on freedom of expression. This will be discussed in the next chapter in which the practice of freedom of expression in Malaysia is examined.

CHAPTER 3

FREEDOM OF EXPRESSION IN MALAYSIA

2.0 INTRODUCTION

Freedom of speech and expression is vital for citizens of democratic countries. The freedom enables the people to take part within a democratic framework, to cherish the ideals of a government by the people for the people. Democracy is worthless if it does not allow free expressions on all matters pertaining to political and social aspects of the people. To have freedom of expression is to allow the people to exercise their democratic rights on the basis of well-informed decisions. As such democracy without freedom of speech and expression is untenable.

Malaysians take pride in the fact that they practice parliamentary democracy. They have, since their independence in 1957, held free general elections as enjoined in the Constitution. The same system has enabled the country to prosper from the status of an under-developed to a developing country. Democracy flourishes when people are given the space to participate in the system. Democracy has also contributed to the fact that Malaysia is now recognised as one of the fast growing economic countries in the Asian region.

However, there is a vexed question as to why in a progressing country like Malaysia, should any issue of public interest be suppressed? If the society is expected to mature and become a developed society, as envisaged under the Vision 2020,³³³ the people should be allowed to make an informed judgment on matters affecting their interest without undue restrictions. For this to have any prospect of becoming a reality, freedom of expression must be pragmatically exercised rather than just a mere proclamation of its existence in black letters. As a developing democratic country, Malaysia embraces certain aspect of liberal democracy such as freedom and liberty. Arguably, the Western

³³³ This is a national policy towards making Malaysia as a fully developed nation by the year 2020.
<http://www.pmo.gov.my/website/webdb.nsf/vALLDOC/BA7051FF90767AD848256E84003129CA>

liberal democracy as reflected in Dworkin's³³⁴ writing may not be the sort of model that suits the Malaysian socio-political environment. The right-based approach in the Western model gives prominence to the empowerment of individual rights. On the contrary, the Malaysian Constitution qualifies the rights on the ground of communitarian interest as stated in Article 10 (2).³³⁵ Siti Norma J in *Lee Kuan Yew v Chin Vui Khen & Anor*³³⁶ rejected the effort by the defendants to relate the approach to freedom of expression with the First Amendment of the USA. She found that the First Amendment is 'totally and radically' different from the local provision of Article 10.³³⁷ Furthermore, the First Amendment is not of any persuasive value.

Notably, a benign development of rights can take place in Malaysia, but progress should proceed incrementally at a slower pace than in the West particularly the United States of America (USA). Radical change in legal landscape by adopting the approach as prescribed by Dworkin could induce the growth of unmanageable racial and cultural tensions. Although it is better for grievances and problems about politics, economics and social matters to be opened for discussion and debate, a lesson ought to be learned from Malaysian history when in 1969, the nation's bloodiest racial riot occurred as a result of sensitive issues being stirred up. Malaysians, who remember the details of this riot, are fully aware that racial feelings are only too easily stirred up by constant harping on sensitive issues like language, privilege and religion.

Malaysia as a democratic country,³³⁸ firmly upholds the right to freedom of speech and expression. This is enshrined in the Federal Constitution in Article 10 (1). This constitutional right enables the citizens to express their minds and thoughts on various aspects. But the importance of freedom of speech and expression does not make the

³³⁴ Dworkin, R. (1977) *Taking Rights Seriously*. London, Duckworth.

³³⁵ The communitarian interest is reiterated by the Malaysian Prime Minister when he explained the national determination under the Vision 2020 policy to practice community-oriented democracy. See, Dato' Seri Abdullah Haji Ahmad Badawi, *Continuity, Change and Cooperation: Malaysia and Japan Working Together*. 10 July 2003, Tokyo.

<http://www.pmo.gov.my/WebNotesApp/tpmmain.nsf/0/ac14767aa20fea2648256d720012ecde?OpenDocument>

³³⁶ [1991] 3 MLJ 494.

³³⁷ *Ibid*, 503.

³³⁸ The government is elected based on representative system through free election. See the Federal Constitution, Chapter 4.

freedom an absolute right. In all democratic states, even in a country that proclaims the right as a positive right such as the USA, there are certain forms of restrictions imposed. The distinction between these jurisdictions is perhaps pertaining to the latitude and parameter of limitation. With regard to freedom of speech, Malaysia has always had a myriad of laws capable of suppressing free speech. Before examining the restrictions on free expression in Malaysia, it is pertinent to forge a better understanding on the exercise of the right.

3.1 HISTORICAL ACCOUNT OF FREEDOM OF EXPRESSION

Freedom of speech and expression is one of the basic features of fundamental liberties in Malaysian Constitution.³³⁹ The Royal Commission under the chairmanship of Lord Reid (Reid Commission) recommended the constitutional protection to freedom of expression.³⁴⁰ Arguably, the recommendation for protection of speech and expression by the Reid Commission is not founded on the intrinsic nature of the right as a pre-requisite of a democratic society. The right is guaranteed due to uncertain apprehension in certain quarters of the society. However, the Commission believed that such apprehension is to be unfounded.³⁴¹ The Commission observed that:

...the rights which we recommend should be defined and guaranteed are all firmly established throughout Malaya and it may seem unnecessary to give them special protection. But we have found in certain quarters vague apprehension about the future. We believe such apprehension to be unfounded, but there can be no objection to guaranteeing these rights subject to limited exceptions in condition of emergency and we recommend that this should be done.³⁴²

Perhaps the casual consideration by the Reid Commission of freedom of speech and expression may be due to the finding by the Commission that it is already 'firmly established throughout Malaya.' The Commission may base its judgment on the presumption that the right that was widely practiced under the British ruling could safely

³³⁹ Ibid, Article 10.

³⁴⁰ Ibrahim, A. and Joned, A. (1987) *The Malaysian Legal System*. Kuala Lumpur, 54-55.

³⁴¹ See Bari, A. Freedom of Speech and Expression in Malaysia. (1998) 28 *INSAF* 149, 152

³⁴² The Report by the Federation of Malaya Constitutional Commission, 1956-1957. Cited in Tan, K. and Li-ann. (1997) *Constitutional Law of Malaysia and Singapore*. Kuala Lumpur, 743.

continue to be practiced after the independence.³⁴³ It appears that the initial stand of the Commission was that the freedom warrants no special protection. The protection was given mainly because of the fear by certain quarters of its practice after the independence. As a result, the Constitution, which was promulgated on the 31st August 1957, had incorporated an equivocal freedom of speech and expression as one of the fundamental rights bestow upon its citizens. The residual characteristic of the right is the legacy of the British system in Malaysia.

Freedom of expression under the Constitution is a positive right that cannot be denied by the government. However, other interests curtail the enjoyment as stated in Article 10 (2) (a) of the Constitution. The Article provides:

Such restriction as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privilege of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence

Thus, the real issue is not the question of the existence but, rather, the exercise of the right. The exceptions as stated in Article 10 (2) (a) determine the extent and context of the exercise of freedom of expression. Since Parliament has the power to determine the scope of exceptions, the extent of executive influence, thus, needs further inquiry. Arguably, the executive branch in Malaysia acquires wide power to determine the extent of freedom of speech under Article 10 of the Constitution. Though there is a separation of power among three main bodies, the executive, legislature and judiciary under the Constitution, there is no clear separation between the executive and the legislature.

Notably, the imposition of restrictions through arbitrary exercise of power will only erode the right. Consequently, the functioning of a democratic system may be at risk of being replaced by an autocratic system. Restrictions on freedom of speech may deprive the citizens from receiving balanced information that could enable them to form their judgment. In this regard, freedom of speech and expression is particularly important to

³⁴³ The Commission was too optimistic about the right. See Harding, A. (1996) *Law, Government and the Constitution*. London, 45.

create a well informed society; a pre-requisite for a vibrant democracy. On this premise, there is a need to have a clear meaning and scope of free speech. This is the focus of the following discussion.

3.2 THE MEANING OF FREEDOM OF SPEECH UNDER THE CONSTITUTION

In Malaysia, freedom of speech and expression is a nebulous fundamental right.³⁴⁴ This is enshrined in Article 10 (1) (a) of the Malaysian Constitution:

Every citizen has the right to freedom of speech and expression.

Even though there is an explicit guarantee of freedom of speech and expression, the Constitution does not elaborate on the meaning of the right. The provision is wide enough to cover all modes of communication. Raja Azlan Shah J. in *Public Prosecutor v Ooi Kee Saik & Ors*³⁴⁵ explains the right by saying that ‘the right to freedom of speech is simply the right which everyone has to say, write or publish what he pleases so long as he does not commit a breach of the law.’³⁴⁶

Speech and expression can be in the form of verbal and non-verbal activity.³⁴⁷ It involves communication by word of mouth, signs, symbols and gesture; and through works of art, music, sculpture, photographs, films, videos, books, magazines and newspapers.³⁴⁸ It is the freedom to communicate one’s idea through any medium. Symbolic speech such as flag burning³⁴⁹ does not involve verbal communication. What it uses is a form of non-linguistic symbol to inform and communicate to others. Thus, expression has both content and form. On the other hand, conduct is expressive if it attempts to convey meaning and the meaning is the content.

³⁴⁴ The provisions in Article 5 to 13 are the fundamental liberties under the Federal Constitution.

³⁴⁵ [1971] 2 MLJ 108.

³⁴⁶ Ibid, 112.

³⁴⁷ Raz, J. (1994) *Free Expression and Personal Identification*. In W. J. Waluchow (ed.) *Free Expression: Essays in Law and Philosophy*. Oxford, 1.

³⁴⁸ Faruqi, S. *Free Speech and the Constitution*. (1992) 4 CLJ 34, 36.

³⁴⁹ *DPP v Percy* [2001] EWHC 1125.

The concept of freedom of speech and expression also encompasses freedom of the press.³⁵⁰ The role of the press as a feeder of information to the society on various issues relates to speech and expression in the wider sense. Nevertheless, there is no special privilege accorded to the press.³⁵¹

3.3 THE SCOPE OF FREEDOM OF SPEECH UNDER THE CONSTITUTION

Freedom of expression covers any expression however unpopular, distasteful or contrary to the ideas of the ruling government. A free society cannot function with coercive legal censorship in the hands of persons who are inclined to use the power of the censor to suppress opposing viewpoints. Nevertheless, Gopal Sri Ram JCA expresses the view that the courts should keep in tandem with the national ethos as reflected in the written laws passed by an elected legislature.³⁵²

Freedom of speech and expression under the Constitution is specifically conferred to the citizens.³⁵³ The implication of Article 10 (1) (a) that provides ‘Every citizen has the right to freedom of speech and expression’, thus excludes the non-citizens from receiving constitutional protection. Consequently, foreigners in Malaysia are not entitled to claim the right by invoking the constitutional provision. They also cannot seek protection under the Constitution if they are charged with violating the restriction on freedom of speech. From the Constitution’s point of view, the government is entitled to curtail their freedom of speech and expression as they are subjected to the Malaysian laws.

It would follow from this that not only the non-citizen but also an artificial person such as corporations, even though incorporated in Malaysia, would not be entitled to claim the right. This is because citizenship³⁵⁴ is confined to natural person.³⁵⁵ At this juncture,

³⁵⁰ Per Abdul Hamid LP in *New Straits Times Press (M) Sdn Bhd v Airasia Bhd* [1987] 1 MLJ 36, 39

³⁵¹ *J Heng Consulting Services (M) Sdn Bhd & Anor v The New Straits Times Press (M) Bhd* [2003] 5 MLJ 481.

³⁵² *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* (1999) 1 MLJ 371.

³⁵³ Unlike personal liberty, abolition of slavery and forced labour, freedom of religion and right to property, these rights are available to citizens and foreigners alike. See Faruqi, S. (1999) *Human Rights and the Constitution*. In S. Rachagan and R. Tikamdas (eds.) *Human Rights and the National Commission*. Kuala Lumpur, 140.

³⁵⁴ Under the Malaysian Constitution there are four ways a person can acquire citizenship. It can be by birth, descent, registration and naturalization. See Article 14, 15, 16 and 19 of the Federal Constitution.

reference to an Indian authority is helpful as Article 19 (1) of the Indian Constitution is considerably similar to the corresponding provision in Article 10 (1) of the Malaysian Constitution. The Supreme Court of India in *Bennet Coleman v. Union of India* stressed that:

...the editor, the printer, the Deputy Director who are all citizens and have the right to freedom under art 19(1) can invoke those rights for freedom of speech and expression, claim by them for freedom of the press in their daily publication...³⁵⁶

International instruments such as the International Covenant on Civil and Political Rights 1966 (ICCPR) and European Convention on Human Rights (ECHR) recognise the necessity for restricting freedom of expression. Article 19 (3) of the ICCPR acknowledges that the exercise of the right comes with special duties and responsibilities. Any restriction imposed on the right shall be in accordance with the law. Matters pertaining to rights and reputations of others; national security, public order, public health and morals, are given prominence in limiting the scope of freedom of expression. Under the European jurisprudence these limitations are couched by the doctrine of proportionality.

In the Malaysian context, the purpose of the restriction is to safeguard other interests that are deemed to be more important. In this regard, Raja Azlan Shah J in *PP v Ooi Kee Saik*³⁵⁷ said:

It also would seem to be true, as a general statement, that free and frank political discussion and criticism of government policies cannot be developed in an atmosphere of surveillance and constraint. But as far as I am aware, no constitutional state seriously attempted to translate the 'right' into an absolute right. Restrictions are a necessary part of the 'right' ...freedom of speech and expression is, in spite of formal safeguards, seriously restricted in practice.³⁵⁸

³⁵⁵ The right is confined only to citizens and 'not in terms extended to the press.' See Tan, op cit., n. 349, 643.

³⁵⁶ AIR 1973 SC 107.

³⁵⁷ [1971] 2 MLJ 108.

³⁵⁸ Ibid, 110

Apparently, unregulated freedom of expression could create tension in society. This is more profound in a society with diverse cultures and religious background such as Malaysia.³⁵⁹ The government is confronted with responsibility to create an environment of tolerance and harmony for the betterment of the people. Thus, to a certain extent, regulation on freedom of expression is necessary to preserve the standard and quality of life in a plural democratic society.

However, any abuse of the justification for restricting freedom of speech and expression undermines the constitutional right. The imposition of restriction under autocratic regulation more often than not suppresses the people from exercising their rights to express and receive information. Although freedom of speech and expression is not absolute,³⁶⁰ restrictive regulations would defeat the purpose of guaranteeing the right under a constitutional framework. In order to preserve the Constitution as the supreme law of the land, restrictions on free speech should be narrowly interpreted. This is pertinent in the case of Malaysia with its vision to create a developed society under the grand Vision 2020.

On the other hand, the Malaysian plural society requires stability in the political, economic and social aspects. There are situations where restriction is required to maintain stability in the society. For instance, the gap in economic procurement between the racial groups propelled the introduction of the New Economic Policy (NEP) in 1970 to create stability.³⁶¹ The NEP had two prong objectives, firstly 'poverty eradication regardless of race' and secondly, 'restructuring society to eliminate the identification of race with economic function'. The NEP was supposed to create the conditions for national unity by reducing inter-ethnic resentment due to socio-economic disparities. The policy sparks discontentment because it creates privilege and favouritism in multiracial society. In practice, the NEP policies were seen as pro-*Bumiputera* (natives), the largest indigenous ethnic community. But, sometimes these situations are being manipulated to achieve ulterior objectives such as the preservation of political supremacy.³⁶² Public order and

³⁵⁹ *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566, 580.

³⁶⁰ Bari, A. Freedom of Speech? Yes, but with constraints. *The Sun*, 4 May 1997.

³⁶¹ Sundram, J. (2001) Malaysia's New Economic Policy and 'National Unity'. Switzerland, UNRISD.

³⁶² *Ibid*, 14-15.

security are commonly cited to necessitate restrictions on questioning the implementation of such a policy. Justification of public order and security by a powerful executive without judicial scrutiny is a recipe for autocracy. In this context, reliance on public order and security may be seen to be a façade to legalise restrictions on freedom of speech and expression.

Freedom of speech and expression as guaranteed by the Constitution is not absolute. Article 10 (2) (a) empowers Parliament to limit the scope of the right through legislation. The article provides:

(2) Parliament may by law impose-

(a) on the rights conferred by paragraph (a) of clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence.

There are two main provisions in the Constitution that restrict freedom of speech and expression. First, the restriction on specific grounds as stated in Article 10 (2) (a). The provision allows Parliament to enact laws that have the effect of restricting the right, which in the opinion of Parliament is necessary and expedient. The ground for restriction must be based on:

- (a) The interest of security of the Federation or any part thereof
- (b) Friendly relations with other countries
- (c) Public order
- (d) Morality
- (e) Protection of the privileges of the Parliament or Legislative Assembly
- (f) Contempt of court
- (g) Defamation or
- (h) Incitement to any offence.

The existence of the requirement 'necessary and expedient' would practically make Parliament as the ultimate decision-making body. The prerogative power of Parliament in this matter is vast. Parliament is not obliged to prove the necessity and expediency of the law in restricting freedom of speech and expression. As such, the courts are powerless to

annul the law, as there is no requirement of reasonableness.³⁶³ On this point, Chan J. in *Public Prosecutor v Param Cumaraswamy*³⁶⁴ said ‘the validity of any law which Parliament under Article 10 (2) (a) has deemed necessary to pass to impose restriction on freedom of speech shall not be questioned.’³⁶⁵

Nonetheless, perhaps it is not an exaggeration to say that Malaysians do have the right to freedom of speech and expression but not the freedom after speech.³⁶⁶ This is because of the residual character of the right and the wide scope of restriction that is emphatically stated in Article 10 (1) (a), clause (2) (a) and clause (4).³⁶⁷ To elaborate on this matter, the next discussion will further probe on the restriction of free expression under the Constitution.

3.4 CONSTITUTIONAL EXCEPTIONS

The right of Malaysian citizens to freedom of speech and expression under the constitution is framed in pragmatic terms. Whilst the right is guaranteed, it does not necessarily mean that it can be exercised in any way as one likes. Qualification of the right is equally important to prevent harmful effect on the interests as stated in Article 10 (2) (a) and clause (4). The incorporation of the interests reflects the need to secure a tolerant environment, based on the reality of Malaysian society.

The interests pertaining to security, friendly relations, public order and morality are more appropriate to be deliberated by the Parliament rather than the courts. These are the domains of Parliament of which the executive is accountable to. It is for the executive to determine as a matter of policy whether activities are prejudicial to national security.³⁶⁸ Decision on national security should be left to the executive because this is an area which the courts have no expert knowledge. Arguably, the courts are not representative bodies

³⁶³ Unlike Article 19 of the Indian Constitution, which has almost similar provision with Article 10 of the Malaysian Constitution, restrictions are qualified with the requirement of reasonableness. This empowers the Indian courts to scrutinize the legitimacy of any restriction on free speech.

³⁶⁴ [1986] 1 MLJ 512.

³⁶⁵ Ibid, 517.

³⁶⁶ Jewa, S. (1996) *Public International Law: A Malaysian Perspective*. Kuala Lumpur, 593.

³⁶⁷ Bari, A. Freedom of Speech and Expression in Malaysia after Forty Years. (1998) 27 *INSAF* 149, 151.

³⁶⁸ *Teh Cheng Poh v PP* [1978] 1 MLJ 30.

properly to be entrusted with policymaking power and governance. Their judgments are best informed within the limit of rules and principles. The courts are reluctant to indulge in matters deemed to be within the legislative power. The Federal Court in *Loh Kooi Choon v Government of Malaysia* observes this³⁶⁹ when Raja Azlan Shah FJ said:

The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meant for judicial determination. To sustain it would cut very deeply into the very being of Parliament.³⁷⁰

Matters of national security are different from matters of national interest. National interest may be likened to that of public interest. But national security has always been considered by the courts to require special treatment.³⁷¹ In this regard, Lord Fraser had summed up a proposition in the English case of *Council of Civil Service Unions & Ors v Minister for the Civil Service*³⁷² when he said, "Those who are responsible for national security must be the sole judges of what the national security requires. It would obviously be undesirable that such matters should be made the subject of evidence in a court of law or otherwise in public."³⁷³

Even though matters on national security remain within the prerogative power of the executive, this does not imply that the executive in Malaysia is beyond legal scrutiny. Question of legality of the executive conduct is well within the courts' jurisdiction. This is illustrated in the case of *Mohamad Ezam Bin Mohd Noor v Ketua Polis Negara & Ors*.³⁷⁴ In this case, despite the press statement of the respondent that the appellants were detained because they were a threat to national security, the appellants were not interrogated on the militant actions and neither were they questioned about getting explosive materials and weapons. Instead, the appellants were mainly asked about their political activities for intelligence gathering. The court found that there was much force

³⁶⁹ [1977] 2 MLJ 187.

³⁷⁰ Ibid, 188. This was followed by the High Court in *Mohamad Ezam Bin Mohd Nor & Ors v Menteri Dalam Negeri & Anor* [2003] 2 MLJ 364, 376. See also per Salleh Abas LP in *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293, 298.

³⁷¹ Abdullah, M. D. *National Security Considerations under the ISA 1960 – Recent Development*.
<http://www.mlj.com.my/free/dzaidin.htm>

³⁷² (1985) AC 374.

³⁷³ Ibid.

³⁷⁴ [2002] 4 MLJ 449.

in the contention of the learned counsel for the appellants that the detentions were for the ulterior purpose and unconnected with national security. Steve Shim CJ said that ‘The executive, by virtue of its responsibilities, had to be the sole judge of what national security required. Although a court would not question the executive's decision as to what national security required the court would nevertheless examine whether the executive's decision was in fact based on national security considerations.’³⁷⁵

The pragmatic approach of the court streamlines the executive prerogative so that it conforms to the requirement of law. The approach would enable the courts to assert its function in upholding the supremacy of the constitution particularly in relation to the fundamental liberties. Although the courts have no power to determine the circumstances that amount to national security, it can decide on the question of whether executive conduct has a nexus with the requirement of national security. This is illustrated in the case of *Minister for Home Affairs, Malaysia & Anor v Jamaluddin Bin Othman*.³⁷⁶ The Supreme Court found that a mere participation in meetings and seminars could not make a person a threat to the security of the country. As regards the alleged conversion to Christianity of six Malays, even if it was true, it could not by itself be regarded as a threat to the security of the country.

Restrictions on freedom of speech and expression are permitted for the purpose of preserving foreign relationships. Matters pertaining to good relations with other foreign countries are dictated by the government's foreign policy. In this regard, the executive will determine the extent and nature of a relationship with other countries.³⁷⁷ Though there is no specific law to regulate freedom of expression on this ground, administrative instruments in term of foreign policies will normally serve as guidelines. Bilateral relationship is important not only for political purposes but also for economics as well. In relation to this, Malaysia had a tragic experience when a good relationship with a neighbouring country, Indonesia, broke down in 1964. This led to a confrontation, which threatened the security of both countries.

³⁷⁵ Ibid, 481.

³⁷⁶ [1989] 1 MLJ 418.

³⁷⁷ For instance, Malaysian citizens are allowed to travel to all countries except Israel. This is stated in their international passport.

The interest in maintaining good relations with other countries override the exercise of free speech and freedom of the press. This is apparent when a chief editor of a local mainstream national newspaper was sacked because of an article written by him that caused uneasiness on the part of the government of Saudi Arabia.³⁷⁸ This illustrates that criticisms on foreign countries that could jeopardise good relationship and rapport are monitored. But latitude is given to allow criticism when the government is involved in a strained relationship with other countries. For instance, relations between Malaysia and Britain deteriorated in the 1970s over various issues, including attempts made by the government to gain control over several large British-owned companies in the country. Consequently, Malaysia propagated a campaign of 'Buy British Last'.³⁷⁹

Another justification for restriction of freedom of expression is on the ground of public order. Public order refers to the tranquility and security that every person feels under the protection of the law.³⁸⁰ Public safety is part of the wider concept of public order. It means security of the public and their freedom from danger, which includes the securing of public health. Therefore, prohibiting public discussion by the media on matters that are prejudicial to public order is constitutionally legal.

The legality of any restriction that is not within the ambit of Article 10 (2) (a) can be challenged. The courts have the power to declare restriction as unconstitutional if it is not under one of the interests in Article 10 (2) (a). However, the courts lack judicial enthusiasm when it comes to protecting the right against the executive and Parliament.

The courts are assertive on restrictions laid down by Parliament rather than being inquisitive on the aims and functions of the right.³⁸¹ This may be due to the abdication of the courts power by the executive through the provision of laws. The courts are paralysed to exercise its judicial ability to scrutinise and check the executive conduct through judicial review. For instance, the Internal Security Act 1960 allows a detention without

³⁷⁸ Former NST group editor-in-chief pledges support. *Bernama*, 24 November 2003.

³⁷⁹ Asian Political News, Mahathir leaves lasting legacy to Malaysia-Japan ties. *Kyodo News International*, 3 November 2003. http://www.findarticles.com/p/articles/mi_m0WDO/is_2003_Nov_3/ai_109563574

³⁸⁰ *Re Tan Boo Liat* [1976] 2 MLJ.

³⁸¹ Addruse, A. *Fundamental Rights and the Rule of Law: Their Protection by Judges*. Paper presented at 12th Commonwealth Law Conference. Kuala Lumpur. See also Bari, A. Freedom of Speech and Expression in Malaysia (1998) 28 *INSAF* 149, 156.

trial for up to two years of any person of whom the government is satisfied that such detention is necessary to prevent him from acting in any manner prejudicial to national security, the maintenance of essential services or to the economic life in Malaysia. Detainees under the Act have no recourse to ordinary judicial remedies. They can make representations to an Advisory Board established under the Constitution, which reports to the executive. The Federal Court in *Kerajaan Malaysia, Menteri Dalam Negeri dan Ketua Polis Negara v Nasharuddin bin Nasir*³⁸² held that it is not open to the Court to examine the sufficiency or relevancy of the basis upon which the Minister formed his conclusion. This is because he can only make decision alone. In this case, the respondent was arrested in pursuant to section 73 (1) of the Internal Security Act 1960 (ISA). The respondent filed an action at the High Court praying, *inter alia*, for the right of access to legal representation and order of *habeas corpus*. However, before the application for *habeas corpus* was heard, the Minister had issued an order for detention under section 8 of the ISA.

To inquire into the fairness of restriction could amount to meddling into the executive power. This is contrary to the doctrine of separation of powers as the scope of restrictions is determined by Parliament. In relation to this, Ong CJ reminds that ‘The duty of the court is to interpret and uphold the law passed by Parliament.’³⁸³ In addition, restriction on freedom of expression was raised in *Lau Dak Kee v PP*.³⁸⁴ In this case the appellant was found guilty and convicted for having contravened the permit issued by the police under section 27 of the Police Act 1967. The judge said that ‘these rights (to free speech, assembly and association) are, however, subject to any law passed by Parliament.’³⁸⁵ The cases portray the attitude of the courts in accepting the superiority of the executive and Parliament. This is inconsistent with the fact that the Constitution is the supreme law of the land.³⁸⁶ The courts, through its judicial activism, should preserve the positive right of freedom of expression as enshrined in the Constitution. Unfortunately, the attitude of the

³⁸² Unreported case, Criminal Appeal No. 05-75-2002(B), mentioned in Abdullah, M. D., National Security Considerations under the ISA 1960 – Recent Developments.

<http://www.mlj.com.my/free/articles/dzaiddin.htm>

³⁸³ See *Melan Abdullah v PP* [1971] 2 MLJ 280, 283.

³⁸⁴ [1976] 2 MLJ 229.

³⁸⁵ *Ibid*, 230.

³⁸⁶ Article 4 (1) of the Federal Constitution.

courts in relation to free speech is similar to the executive's: it is perceived as residual in character. Therefore, it is submitted that there is a need for the courts to treat the right intrinsically as well as instrumentally so that the constitutional protection on free speech does not become otiose.

In addition, Article 10 (4) provides for restriction on classified sensitive matters. The restriction is absolute in the sense that it cannot be challenged in the court of law. The article reads:

In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2) (a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

The provision excludes the role of the courts whereby the legality of restriction is not a subject of judicial review. The constraint on freedom of expression under this provision relates to subject matters that are strictly beyond scrutiny in the interest of security or public order. The subject matters are citizenship, national language, privileges for the *Malays* and the Rulers' sovereignty. Naturally, these subjects are common topics with no real threat to the national security or public order. However, considering the climate of the plural society in Malaysia, these are the sensitive areas which may easily lead to racial tension. Tun Abdul Razak, the then Prime Minister, expresses this during the parliamentary debate on the Constitution Amendment Bill 1971. The justification for such a prohibition is 'to redress the racial imbalance in certain sectors of the nation's life in so far as this imbalance can be rectified by legislation'.³⁸⁷

Lessons from the past experiences have made these sensitive issues tightly guarded in order to maintain security and public order.³⁸⁸ Since Malaysian society and culture has been dominated by racial and ethnic preoccupations, thus, it is widely agreed in Malaysia that the greatest threat to socio-political stability, especially since the late sixties, has

³⁸⁷ Parliamentary Debates on the Constitution Amendment Bill 1971. Kuala Lumpur, Government Printers.

³⁸⁸ Yusuf, A. (1987) *Freedom of the Press in Malaysia*. Paper presented at 10th LAWASIA Conference. Kuala Lumpur, 2.

been inter-ethnic disharmony.³⁸⁹ Though efforts to foster national integration and unity³⁹⁰ are intensified, a genuine national unity remains questionable if socio-political matters are being polarised on the basis of ethnicity.

The backdrop of Malaysian socio-political environment provides a strong basis to give priority to peace, stability and harmony at the expense of the democratic right of the people. The restrictions are wide to the extent that 'there are likely to be very few possible restrictions which could not be said to come within the kinds of restriction permitted by Article 10.'³⁹¹ The extent of restriction covers all categories of expression. However, the next discussion will show that leverage is given to certain types of expression while others are strictly inhibited.

3.5 CATEGORIES OF EXPRESSION

3.5.1 POLITICAL EXPRESSION

Freedom of speech and expression is a cornerstone of a functioning democracy. The significance of political speech in Malaysia, which stimulates discussion on public matters, has lessened the vitality of other categories of expression such as artistic and commercial expression. According to Barendt political speech refers to 'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about'.³⁹² He argues that this type of speech should be immuned from restriction because of its conduciveness to the operation of a constitutional democracy.

Barendt's opinion may suit well in an atmosphere where mature and vibrant democracy is practiced in a homogeneous society. Leverage on free expression according to Barent's conviction, though important under liberal political philosophy, is rather a utopian concept and an ideal situation in the case of Malaysia. However, it is difficult to apply this concept in a Malaysian plural society that exercises a distinctive parliamentary

³⁸⁹ Sundram, J. (2001) *Malaysia's New Economic Policy and 'National Unity'*. Switzerland, UNRISD, 15.

³⁹⁰ Recently, a new Department of National Unity and Integration was established. <http://www.pmo.gov.my>

³⁹¹ Harding, A. (1996) *Law, Government and the Constitution in Malaysia*. London, 189-90.

³⁹² Barendt, E. (1985) *Freedom of Speech*. Oxford, 152.

democracy whereby the executive is dominant and powerful.³⁹³ Datuk Dr Rais Yatim, the Minister in the Prime Minister's Department, reiterates this when he said that Malaysia would continue with its distinctive way of practicing civil liberty.³⁹⁴ An example of the Malaysian distinctive way is the exclusion of judicial review, a creature of common law, which empowers the courts to scrutinise the executive conduct. Statutory legislations that provide for such exclusion 'must prevail over judicial review if the statute is unmistakably explicit in ousting judicial review by the courts.'³⁹⁵

The imposition of limitations on freedom of expression in Malaysia could be influenced by the lessons from racial and political turmoil of the past. The real question that needs to be addressed is not whether there exist freedom of expression but to what extent freedom of speech and expression can be exercised in Malaysia. Since the independence in 1957, most of the efforts have been concentrated on developing the country. The quest for progress and development creates a sense of urgency in preserving security, political stability and fair distribution of economy.³⁹⁶ As such, the emphasis given to nation building suggests that restrictive laws are necessary to achieve these goals. In this respect, it can be said that Malaysia adopts the position of what is good for its citizens by assuaging the principle of human rights.

Preservation of security has been a continuous agenda especially with the insurgence of communist threat before independence. Some of the legislative efforts introduced at that time are still maintained and have continued to be applicable until today.³⁹⁷ The necessity to overcome the threat has culminated in the introduction of security laws such as Internal Security Act 1960 and Restricted Residence Act 1933.

Arguably, the basis of the existence of restrictive laws is no longer posing real or eminent threat. This raises a question of the relevance in continuing with the application of the laws. What seems to be initially a genuine effort to combat communist threat and

³⁹³ Yatim, R. (1994) *The Role of Law and Executive Power in Malaysia: A Study of Executive Supremacy*. University of London.

³⁹⁴ See, Change in laws must meet needs. NST, 8 September 2000, 10.

³⁹⁵ *Kerajaan Malaysia, Menteri Dalam Negeri dan Ketua Polis Negara v Nasharuddin bin Nasir*. Unreported, Criminal Appeal No. 05-75-2002(B).

³⁹⁶ Abraham, C. Freedom of Speech for Whom? The Malaysian Case. (1998) 27 *INSAF*, 4.

³⁹⁷ Sedition Act 1948 and Restricted Residence Act 1933

subversive activities could be used to maintain political power.³⁹⁸ The use of security related legislations, such as the Internal Security Act 1960 and Official Secret Act 1972, to detain leaders of opposition political parties vindicate this point.³⁹⁹ However, the terrorists' attack on the World Trade Centre in the United States of America has made protection of national security even greater. This presents the government with a legitimate ground to justify the need to continue the application of security laws. Though the threat of communists and related activities no longer exist in Malaysia, the laws are still relevant in curbing activities that posed a threat to security and public order in general. The application of the law could be used to hinder threats from both external and internal such as drugs trafficking and religious extremism. However, a draconian provision such as detention without trial and absolute discretionary power of the executive should be repealed.

In addition, Article 149⁴⁰⁰ and 150⁴⁰¹ give a blanket power to Parliament to enact laws for the purpose of security. The validity of laws pass under the authority of both provisions cannot be questioned even if it contravenes the provision on fundamental liberties. The impact of political expression on peace, stability and harmony has widened the restriction. This is evident in the Constitution with a list of sensitive issues introduced by the Constitution (Amendment) Act 1971.⁴⁰² In 1969, Malaysia experienced the first racial riot sparked by racial sentiments that later put the country under the state of emergency. The main factor that caused the unrest was the inflammatory speeches made during the general elections in 1969.

The sensitivity of racial sentiment is stressed in *Melan bin Abdullah & Anor v Public Prosecutor*⁴⁰³ where a newspaper published a report of a talk given by a prominent *Malay* leader with an editorial sub-heading entitled: 'Abolish Tamil or Chinese medium schools

³⁹⁸ A number of political figures were detained under 'Operasi Lalang' in 1987. See Shankar, M. *Freedom of Expression: Its Extent and Limits and the Problems it Encounters*.

<http://www.mlj.com.my/free/articles.htm>

³⁹⁹ *Mohamad Ezam Bin Mohd Noor v Ketua Polis Negara & Ors.* [2002] 4 MLJ 449.

⁴⁰⁰ This provision empowers the Parliament to enact laws against subversion, organized violence and crimes prejudicial to the public.

⁴⁰¹ This provision refers to laws at time of emergency.

⁴⁰² Act A30/71.

⁴⁰³ [1971] 2 MLJ 280.

in this country'. The editor-in-chief and the author of the sub-heading were prosecuted under the Sedition Act 1948. Both were convicted and fined by the lower court.

Democracy in Malaysia is shaped by politics of ethnicism.⁴⁰⁴ The existence of political parties is based on ethnic support. The United Malays National Organization (UMNO) is one of the main political parties representing the *Malays* as the majority race in Malaysia.⁴⁰⁵ In order to garner the support of the *Malays*, *UMNO* carries a political slogan of *Ketuanan Melayu* (Malay Lordship) as a reminder that the *Malays* rule the country. Although there are efforts to subdue the sentiment during Dr. Mahathir Mohamad premiership through his liberalization programmes such as *Bangsa Malaysia* (Malaysian race), vision schools and meritocracy system, it is insufficient to defuse the prejudices among the races.⁴⁰⁶

The creation of *Barisan Nasional* (National Front), a co-operation of several ethnic political parties (UMNO, MCA and MIC), as one political force is an effort towards integration. From the government's perspective, it is vital to maintain racial harmony and unity within the fragile multi-racial society. The impact of political instability will not only jeopardise the harmonious social milieu, but it will also bring an impact on economic prosperity.

On the other hand, in the process of realizing the aspiration of becoming a developed country, the government seems to broaden the parameters of restriction on freedom of expression. This is seen as manipulating the justification for restrictions on the pretext of the nation well being for political gain. Political opposition leaders are detained on the ground of incitement of hatred,⁴⁰⁷ public order and national security.⁴⁰⁸ The High Court in *Lau Dak Kee v Public Prosecutor*⁴⁰⁹ held that the condition imposed by the police that

⁴⁰⁴ Loh, F. (2002) *Developmentalism and the limits of Democratic Discourse*. Richmond, 21.

⁴⁰⁵ The support from the Malays decreased during the 1999 general election where the opposition party PAS, another Malays dominant party, managed to take over two states in Peninsular Malaysia.

⁴⁰⁶ A common issue such as education can simply turn into racial sentiment. This is evident in an incident between the *Pemuda UMNO* (the youth wing of UMNO) and *Sui Qui*, an independent Chinese education group, in 2000.

⁴⁰⁷ Lim Guan Eng's case. <http://www.ipu.org/hr-e/161/mal11.htm>

⁴⁰⁸ In 1987 under Operasi Lalang several political leaders, academicians and social activists were arrested. In 1998 during the Anwar Ibrahim malaise several politicians were arrested.

⁴⁰⁹ [1976] 2 MLJ 229. See also *Madhavan Nair & Anor v Public Prosecutor* [1975] 2 MLJ 264.

prohibit speeches in an assembly on the results of examination and the status of *Bahasa Malaysia* (National language) were not in contravention of Article 10 of the Federal Constitution. However, the court in *Chai Choon Hon v Ketua Polis Daerah Kampar and Government of Malaysia*⁴¹⁰ held that the condition imposed by the police limiting the number of speakers as unreasonable restriction. In this case the appellant had applied for a licence to hold a solidarity dinner organised by an opposition party. The first respondent issued the licence but imposed seven conditions, two of which the appellant sought to impugn on the ground that they were unconstitutional, null and void. The conditions contravened the right of freedom of speech guaranteed under Article 10 (1) (a) of the Federal Constitution. One of the conditions prohibited speeches on political issues. The trial judge held that the condition was in violation of the right to freedom of speech but upheld the condition as to a restriction of the number of speakers.

Another subject of political expression that is being restricted is on religious matters. Religious issues are perceived as political matter as it affects unity and public order especially when they are associated with political parties. Religious extremism is inconsistent with the moderate image advocated by the government. The ruling government under the premiership of Dato' Seri Abdullah Ahmad Badawi popularizes the concept of 'Islam Hadhari'⁴¹¹ (Progressive Islam) to counter the image of fundamentalism and extremism perceived by non-Muslims. Despite the effort to present the image of moderation in the practice of Islam, freedom of speech and expression is still under constraint.⁴¹²

The resurgence of Islam in Malaysia has made *Parti Islam SeMalaysia* (PAS), an opposition party, as a threat in winning the *Malays* support. The ruling government has branded *PAS* as a political party that practices extremism, fanaticism and disuniting the Muslims especially the *Malays*. But so far, no actions have been taken especially against its President who once issued a controversial religious opinion that caused discomfort

⁴¹⁰ [1986] 2 MLJ 203.

⁴¹¹ <http://www.islam.gov.my/islamhadhari/>

⁴¹² Othman, N. (1998) *Islam and the State in Malaysia: A Problem of Democratization and Pluralism*, 17. <http://asef.on2web.com/subsite/ccd/documents/othman.pdf>

among the members of both parties, *UMNO* and *PAS*.⁴¹³ This may be due to the impact on local political scenario and religious unrest expected among the ardent *PAS* followers.

In order to maintain a moderate approach on Islamic religious matters and the correct Islamic teaching in society,⁴¹⁴ the government through the *JAKIM* (Department of Islamic Affairs) has taken several actions that could amount to curtailing freedom of expression. For instance, *JAKIM* introduces standardisation of texts for religious sermons. The prepared texts are based on selected non-controversial topics that can only be delivered by a person approved by the relevant religious authorities.⁴¹⁵ It is an offence to give speeches on Islamic matters without permission from the relevant Islamic religious authority. Section 11 of the *Syariah Criminal Offences (Federal Territories) Act 1997* criminalizes religious teaching without *tauliah* (Permission). Sub-clause (1) provides:

Any person who teaches or professes to teach any matter relating to the religion of Islam without a *tauliah* granted under section 96 of the Administration Act shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand *ringgit* or to imprisonment for a term not exceeding three years or to both.

Such a provision is regarded as a filtering process to silence the conservative approach on Islamic matters particularly propagated by *PAS*. Although the government justifies the exercise of its judgment in the interest of the nation, it benefits the political interest of the ruling government.

Freedom of speech and expression on religious matters may also come under the ambit of freedom of religion. The Federal Constitution guarantees the latter. Article 11 provides that a person is entitled to profess, practice and propagate his belief. However, clause (4) of the article qualifies the freedom to the effect that propagation of any doctrine or religious belief among Muslims can be controlled and restricted by the state and federal law. Therefore, freedom of religious expression is exercisable within the same faith but it

⁴¹³ The controversial edict denounces the *UMNO* members within the *Barisan Nasional* as non-believers.

⁴¹⁴ Othman, N. (1998) *Islam and the State in Malaysia: A Problem of Democratization and Pluralism*, 7. <http://asef.on2web.com/subsite/ccd/documents/othman.pdf>

⁴¹⁵ At states level this is done by states Islamic religious affairs.

cannot be actively propagated for the purpose of converting others especially the Muslims.

The propagation of religious belief other than Islam is an issue in *Minister for Home Affairs, Malaysia & Ors v Jamaluddin Bin Othman*.⁴¹⁶ The respondent was detained under the ISA. The grounds for detention stated that the respondent was involved in a plan or programme to propagate Christianity among the Malays. It was also alleged that the activities of the respondent could give rise to tension and enmity between the Muslim community and the Christian community in Malaysia and could affect national security. The court decided that a mere participation in meetings and seminars could not make a person a threat to the security of the country. The court held that the grounds for the detention in the present case read in the proper context are insufficient to fall within the scope of the Internal Security Act 1960, which is a piece of legislation essentially to prevent and combat subversion and actions prejudicial to public order and national security.

In the education sector, academicians and students are caught in the middle between freedom of academic expression and restrictions. Academicians in public educational institutions are obliged to abide by the General Orders 1950 and the *AkuJanji*⁴¹⁷ (Covenant) introduced by the Department of Civil Service (JPA). It is an obligation for all civil servants including academicians and students to sign a pledge of loyalty to the government. Public tertiary institutions, which totally depend on government funding, exercise self-restraint. In relation to this, in August 2001, a secondary school teacher in the State of *Terengganu* was charged with sedition for asking his students to answer a test question regarding the erosion of judicial independence in the country.⁴¹⁸

Consequently, the threat of disciplinary action imposes a culture of fear in educational institutions that affect freedom of speech and expression. The impact of which may suppress the development and creativity in education.

⁴¹⁶ [1989] 1 MLJ 418.

⁴¹⁷ Most of the contents in this document are covered by the General Orders 1950.

⁴¹⁸ Malaysia: Human Rights under threat- the Internal Security Act (ISA) and other restrictive laws.
<http://web.amnesty.org/library/index/engASA280312001?>

In Malaysia, the provisions of the Universities and University Colleges Act 1971 regulate freedom of speech and expression at tertiary level.⁴¹⁹ Section 15 (3) of the Act states:

No person, while he is a student of the University, shall express or do anything which may be construed as expressing support, sympathy or opposition to any political party or trade union or as expressing support or sympathy with any unlawful organization, body or group of persons.

The provision is wide enough to silence a student from expressing his opinion on political matters that is associated with political party. However, it is unclear whether a student who is eligible to vote is affected by this provision. The support to a political party through vote is clearly in contravention of section 15 (3) of the Act. But it is argued that since the right to vote⁴²⁰ is accorded by the Federal Constitution it should prevail over the prohibition imposed by the Act. This is based on the provision of Article 4 (1), which clearly provides that any law that is inconsistent with the Constitution shall be void to the extent of the inconsistency. Moreover, the interest under section 15 (3) does not come under the exceptions that permit restriction of freedom of expression in Article 10 (2) (a). However, the legal conundrum can only be determined by the courts awaiting a test case.

3.5.2 ARTISTIC EXPRESSION

Artistic expression takes many forms, primarily abstract. Artistic endeavours relate directly to the core values including the pursuit of truth and individual self-fulfillment. Art is indispensable to a modern society as a form of expression, which describes and comments on human, social and political conditions. The attention given to this type of expression is less in term of priority than political expression. Perhaps the impact of this expression is less threatening and presents no real danger to the well being of the nation especially in relation to national security. Nevertheless, it is being regulated by statutory regulations including Islamic law.

⁴¹⁹ Malaysian Act 30.15.

⁴²⁰ Article 119 (1) of the Federal Constitution.

Restrictions on artistic expression in Malaysia are mainly on the grounds of public order and morality. Censorship laws have controlled artistic expression particularly in the area of sexual and religious contents. The main legislation that imposes restrictions on this type of expression is Film Censorship Act 2002. Section 5 provides that:

No person shall,

- (a) have or cause himself to have in his possession, custody, control or ownership; or
- (b) circulate, exhibit, distribute, display, manufacture, produce, sell or hire, any film or film-publicity material which is obscene or is otherwise against public decency.

Artistic expression is also being regulated under institutional mechanism such as Board of Censors.⁴²¹ The approval of the Board is necessary in order to 'circulate, exhibit, distribute, display, manufacture, produce, sell or hire, any film or film-publicity material.'⁴²² Film of obscene in nature or against public decency is prohibited under Section 5 (1) (b) of the Film Censorships Act 2002. In 2004 the board refused to allow the screening of the film 'The Last Temptation' directed by Mel Gibson in Malaysia. The decision was based on the ground of religious belief and public decency.

Restrictions on this type of expression can also be imposed by the *Perbadanan Kemajuan Filem Nasional Malaysia* Act 1981 (FINAS), Indecent Advertisements Act 1953 and Printing Presses and Publication Act 1984. For instance, section 6 (e) of the FINAS Act provides the functions of the FINAS, *inter alia*, to regulate and control the production, distribution and exhibition of films in Malaysia, and in relation thereto to provide for the issue of licences. In addition, section 22 (1) provides for activity or combination of activities to be licensed, the provision reads:

No person shall engage in any of the activities of production, distribution or exhibition of films or any combination of those activities as specified in subsection 21(1) unless there is in force a licence authorising him to do the same.

⁴²¹ Film Censorship Act 2002.

⁴²² Section 6 (1) (b) of the Film Censorship Act 2002.

Artistic expression in Malaysia could be subjected to dual legal systems. First, the ordinary laws enacted by Parliament and second, the Islamic law which is applicable only to the Muslims. The application of Islamic law in Malaysia is limited in scope. The administration of this law is under the jurisdiction of the states.⁴²³ In relation to artistic expression, moral conformity in accordance with the Islamic teachings is imperative. Immoral conduct and behaviour as perceived by Islam are, therefore, prohibited. For instance, section 31 of *Selangor Syariah Criminal Enactment 1995* provides against indecent acts in public places. According to the provision, any person who, contrary to Islamic Law, acts or behaves in an indecent manner in any public place shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand *ringgit* (Malaysian currency) or to imprisonment for a term not exceeding six months or to both.

With regard to this, in 1997, three Muslim girls were convicted for taking part in a beauty contest in the state of *Selangor*, in defiance of a prohibition imposed by the state Islamic religious authority.⁴²⁴ Prior to that, in 1995 the *Selangor* Islamic religious authorities made a ruling that the participation of Muslim women in a beauty contest is prohibited in Islam.⁴²⁵ This case has raised constitutional issues in relation to freedom of speech and expression. It is uncertain whether participation in a beauty pageant is covered under the concept of freedom of expression in Article 10 of the Federal Constitution. Arguably, it is a form of expressive conducts that involve more than mere physical aspects of the contestants. Therefore, the prohibition made by the state authority could be challenged on the ground of inconsistency with Article 10 of the Constitution. This is because any restriction on freedom of expression can only be made by Parliament. The state legislative assembly does not have the power to make any law that is inconsistent with the Constitution.⁴²⁶ However, since the case was brought under the *Syariah* courts jurisdiction, which is recognised by the Constitution,⁴²⁷ the concept of morality under Islamic teaching is applicable.

⁴²³ State List, Ninth schedule of the Federal Constitution.

⁴²⁴ Article 75 of the Federal Constitution. See, Faruqi, S. Constitutional Supremacy, Fundamental Rights & Fatwa. (1998) 28 *INSAF* 25.

⁴²⁵ *Warta Kerajaan* (1995) Jil. 48, No.10, *Tambahan No.8 Perundangan*.

⁴²⁶ Faruqi, op cit., supra, 36.

⁴²⁷ Article 121 (1A) of the Federal Constitution.

3.5.3 COMMERCIAL EXPRESSION

Commercial expression could be the least protected type of expression. Barendt argues that the importance of certain types of information provides a strong basis for the exclusion of commercial speech. According to him some types of information are more worthy of constitutional protection than others. Protection of commercial speech is difficult to maintain if the concept of freedom of speech is founded in the development of the individual personality. He also contends that 'there remain sound arguments against equating advertising with political and social speech. In particular, promotional slogans and canvassing which make no attempt to appeal to the reason of the people addressed and provide no information should have little or no constitutional protection'.⁴²⁸ In this context, economic gain makes commercial expression that is less coherent worthy to be accorded a constitutional protection.

There is an ambiguity as to whether commercial expression comes under the purview of Article 10 of the Malaysian Constitution. This is because of the uncertainty in recognising a commercial expression within the scope of freedom of speech and expression. An argument for excluding this type of expression from the constitutional framework is that the purpose of information contained in a commercial expression is specifically for commercial and trade purposes.

Since there is a lack of discussion on protection of commercial expression under the Constitution, reference to other jurisdictions of similar constitutional provision is necessary. In this context, Indian Constitution has a similar provision to Article 10 of the Malaysian Constitution. The Supreme Court of India in *Tata Press v MTNL*⁴²⁹ held that commercial speech is a part of the freedom of speech and expression guaranteed under Article 19 (1) (a) of the Indian Constitution. This is justifiable on the basis that it informs the public.

The writer argues that commercial speech could be given a constitutional protection if it conveys information in the furtherance of public interest in matters affecting social and

⁴²⁸ Barendt, E. (1985) *Freedom of Speech*. Oxford, 63.

⁴²⁹ (1995) AIR 1995 SC 2438.

political life of the people. Nevertheless, pure economic gain should not be the basis in justifying constitutional protection for this type of expression. Arguably, in relation to this, the contribution of pure economic gain is minimum in creating and enhancing an informed society. Moreover, pure economic gain is beneficial only for the satisfaction of concerned individuals rather than the public as a whole.

The discussion above reveals that the scope of freedom of expression in Malaysia is limited. This is due to the constitutional provision, which empowers Parliament to make laws that have the effect of curtailing free expression. The source of the power pertaining to this matter is discussed below.

3.6 EXECUTIVE POWER

Article 10 (2) provides that the Malaysian Parliament has the power to restrict freedom of speech and expression, as it deems necessary or expedient. It also makes the Parliament as the final arbiter with regard to the determination of the ground of restriction. This is made clear by Article 4 (2) (b) of the Constitution that provides:

The validity of any law shall not be questioned on the ground that-

It imposes such restrictions as are mentioned in Article 10 (2) but the restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article

Salleh Abbas LP clarifies the authority of the executive in limiting the exercise of free expression in *Theresa Lim Chin Chin & Ors v Inspector General of Police*⁴³⁰ when he said:

It is clear from the provisions of the Constitution, and of the ISA, the intention of the framers of the Constitution is that judges in the matter of preventive detentions relating to the security of the Federation are the executive.⁴³¹

The implication of this case is that the executive has absolute discretion as to the circumstances relating to the security and the reasoning for it. As far as the courts are

⁴³⁰ [1988] 1 MLJ 293.

⁴³¹ Ibid, 296.

concerned, restrictions must be authorised by a statute enacted by Parliament on the grounds as provided by the Constitution. Therefore, the courts have the power to invalidate any restriction that has no connection with the permitted grounds.

In addition, Article 10 (1) (a) confers a wide power to Parliament to set a parameter for restrictions. The words 'necessary' and 'expedient' empower Parliament to decide on the extent of the freedom of speech. The effect of this provision is to create a prerogative power in determining matters of high public importance. There is a limited space for judicial review by the courts to protect freedom of speech. The courts cannot use judicial power in situations where restrictions imposed by Parliament are in accordance with the law. In this instance, the real protector of the freedom is the executive instead of the courts. However, the situation would be different if restrictions on freedom of speech are qualified with the word 'reasonable' as available in the Indian Constitution. Such drafting would give the power to the courts in deciding the reasonableness of the restriction envisaged by Parliament. It creates a mechanism for check and balance on the executive power in restricting free speech.

Nevertheless, it was the idea of the framers of the Constitution to place wide power in the hands of the legislature and the executive to restrict freedom of speech and expression. The power is evident since any law enacted on that matter could not be questioned by the courts. In this sense, the courts have a positive obligation to apply the law. There was an argument by Justice Malik, one of the framers of the Constitution, to the effect that if the courts are given power to question the validity of the law on the ground of reasonableness, then there will be no certainty. Certainly, the effect of wide prerogative power of the executive limits the exercise of free expressions in Malaysia. The primary purpose is to equip Parliament with *carte blanche* power. Perhaps this is the legacy of the British system, which introduces the supremacy of Parliament in the Malaysian Constitution.

The composition of Parliament would make it easier for the executive to introduce laws that have the effect of inhibiting freedom of speech and expression. This is so when there is no strict separation of power between the executive and the legislature in Malaysia.

Those who command the majority of Parliament form the government. This creates a comfortable atmosphere for the ruling political parties that form the government to execute their political agenda to retain the power. For instance, as a result of the recent general election in 2004, the *Barisan Nasional* party (National Front) commands the majority in Parliament. This allows a smooth passage for the approval of any government legislation. This is possible as the ruling government can easily come up with a simple majority needed to pass a new law.⁴³² In relation to this, the case of two members of parliament of a component party MCA, has demonstrated that the executive determines the exercise of freedom of speech and expression. The two representatives were suspended for their action, abstaining from voting against a motion by an opposition party assemblyman. The motion was to postpone the RM1.02 billion State's project during the Penang State Assembly.⁴³³ The two representatives took such a stance because a majority of people in their constituencies opposed a project that affects their area but was approved by the State government.

In addition, it is Parliament that decides what amount to a threat to security, public order or morality. Arguably, some of the executive actions on these matters are based on judgments for the attainment of specific interest particularly in maintaining the political power. For instance, with regard to this matter the existence of prior-restraint on press freedom in term of licensing requirement and absolute discretionary power of the executive, denies the opposition political parties an equal opportunity as enjoyed by the ruling party.⁴³⁴ The executive ulterior motive is evident in the case of *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Ors.*⁴³⁵ In this case, the Court questions the detention of the appellant on security ground. The interrogation conducted by the police is mainly on the political activities of the appellant.

⁴³² Article 66 (1) the Federal Constitution.

⁴³³ Stop war of word says Pak Lah. *MCA Online*, 17 December 2002.

<http://www.mca.org.my/story.asp?file=/articles/news/2002/12/17/12376.html&sec=In+The+News>

⁴³⁴ *Malaysiakini*, an on-line press, application for a licence to publish a printed edition was rejected. *Aliran*, a non-governmental organization, publication is restricted to English version. The government also refused to allow *Harakah*, an opposition political party's publication, to publish daily.

<http://www.suaram.org/update/up20010207.htm>

⁴³⁵ [2002] 4 MLJ 449.

Obviously, the constitutional provisions accord a wide power to Parliament as well as to the executive. However, this does not necessarily mean that the courts in Malaysia are powerless to check any transgression within the constitutional framework. This then leads to another related point of discussion on judicial approach in protecting the fundamental liberties in Malaysia.

3.7. JUDICIAL APPROACH

In relation to free speech, Parliament has the power to determine the necessity or expediency of a law as empowered by Article 10 (2). The courts can only intervene in a situation where restriction is not in accordance with the requirements of Article 10 (1). It must be observed that Article 10 (2) of the Federal Constitution provides that only Parliament may by law impose those restrictions referred to in Article 10 (2), (3) and (4) of the Federal Constitution.

In effect, the courts have no power to decide the necessity and expediency of laws that impose restriction on freedom of speech. Chang Ming Tat J clarifies the limit of the power of the court in this matter when he said ‘it is not within the competency of the courts to question the necessity or expediency of the legislative provision.’⁴³⁶ The fact is that the power of the courts to protect freedom of speech is limited due to a wide scope of constitutional restrictions.

On the other hand, the positive approach adopted by the courts hinders them to a certain extent from questioning the harshness or unreasonableness of the law. The court in *Attorney-General Malaysia v Chiew Thiam Guan*⁴³⁷ underlined the duty of the courts when it said ‘the law may be harsh but the role of the court is only to administer the law as it stands’.⁴³⁸ The reluctance of the courts to scrutinise legislations creates gradations among fundamental rights. Strict interpretation of the law is practised in the case of

⁴³⁶ *Madhavan Nair & Anor v Public Prosecutor* [1975] 2 MLJ 264.

⁴³⁷ [1983] 1 MLJ 51.

⁴³⁸ See also *Public Prosecutor v Yee Kim Seng* [1983] 1 MLJ 252 where the court said that the question of morality of a death sentence is for the Parliament to decide not the court. *PP v Loh Kooi Choon* [1977] MLJ.

political rights, but leverage is given in the case of property right.⁴³⁹ The approach taken by the courts in relation to restriction of freedom of speech and expression, where judicial review cannot be exercised, renders the fundamental liberties of the citizens as illusory rather than real. The impact of this positivist attitude is that it virtually reduced the supremacy of the Constitution as the highest law of the land.⁴⁴⁰

However, there are instances where the courts are inclined towards adopting a pragmatic approach in dealing with issues relating to freedom of speech and expression. Even though the courts admit that a frank political discussion could not be developed in an atmosphere of surveillance and constraint, at the same time however, other public interests need to be secured and promoted. This is emphasised by the court in *Public Prosecutor v Ooi Kee Saik & Ors.*⁴⁴¹ In this case, the court was urged to give the greatest possible latitude to freedom of speech and expression since the Sedition Act touched the very heart of free political comment. However, Raja Azlan Shah J in delivering the judgment said that the decision whether a criticism against the government is justifiable or not, is not for the courts to adjudge. It is for Parliament and the people. The court in *Fan Yew Teng v Public Prosecutor*⁴⁴² adopts the same approach when Lee Hun Hoe CJ said that:

...we have to remember in our society we have a plural society. I will not profess that I am qualified to question the wisdom of Parliament for enacting particular legislation. This, I think, is a matter for the elected representatives to decide whether Malaysia, with her multi-racial society, and in view of the composition of her people, there is a need for a legislation, in the interests of security, to adequately and effectively deal with those words which are expressive of a tendency not to promote peace but to excite ill-will and hostility.⁴⁴³

Perhaps the rigidity of the constitutional provisions inspires the courts to respond in a pragmatic way.⁴⁴⁴ The approach would enable the courts to give meaning to the

⁴³⁹ Faruqi, S. Liberal enough to give life to the law. The Star 2 September 2001, 25.

⁴⁴⁰ Bari, A. Teaching Constitutional Law in Malaysia: An Appraisal. (1999) 1 *MLJ* clxii, clxxiii.

⁴⁴¹ [1971] 2 *MLJ* 108.

⁴⁴² [1975] 2 *MLJ* 235.

⁴⁴³ Ibid.

⁴⁴⁴ Yusuf, M. (1987) *Freedom of the Press in Malaysia*. Paper presented at 10th LawAsia Conference, Kuala Lumpur, 9.

Constitution in upholding the fundamental rights of the people. Therefore, a meaningful understanding of the right to freedom of speech under the Constitution must be based on the realities of the contemporary society in Malaysia by accommodating individual interest with consideration given to the general security.

The vast power enjoyed by Parliament has made the notion of constitutional supremacy an elusive concept. In order to make the Constitution the supreme law of the land as enshrined in article 4, the courts need to renew its approach in terms of judicial activism by upholding the constitutional supremacy. As Jain argues, that without an independent organ to interpret and enforce a written constitution 'it would be reduced to a mere paper document.'⁴⁴⁵ Therefore, the approach of the courts should be liberal and pragmatic rather than conservative and positive.

A liberal approach is to give a creative and purposive interpretation to the Constitution.⁴⁴⁶ The courts as the last bastion in protecting fundamental liberties have to detach itself from the executive not only in terms of influence but also in spirit. The courts as a separate independent body, under the doctrine of separation of power, have to be vigorous in maintaining freedom of speech as provided by the Constitution. There has been a positive indication that the courts embrace a pragmatic approach. The Court of Appeal in *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd*⁴⁴⁷ expressed that:

There must be fairness of state action of any sort, legislative, executive or judicial. No one is above the law. In Malaysia, it is not the law made by Parliament that is supreme, it is the Federal Constitution which is the supreme law. In Malaysia, the ultimate constraints upon legislative power are not political but legal, that is to say that any law passed by Parliament must meet the fairness test contained in art 8 (1).⁴⁴⁸

In this particular case, the court held that section 72 of the *Danaharta Nasional Berhad* Act 1998 as unconstitutional being in contravention of Article 8 (1) of the Federal Constitution. The court stressed that the fundamental liberties guaranteed under Part II of the Federal Constitution, including Article 8 (1) should receive a broad, liberal and

⁴⁴⁵ Jain, M. P. Role of the Judiciary in a Democracy (1979) *JMCL* 239, 284.

⁴⁴⁶ Cardozo, B. (1921) *The Nature of Judicial Process*. New Haven, Yale University Press.

⁴⁴⁷ [2003] 3 MLJ 1.

⁴⁴⁸ *Ibid*, 3.

purposive construction. According to the court when the constitutionality of a statutory provision is called into question, the courts are not concerned with the propriety or expediency of the impugned law. Hence, Parliamentary motive is irrelevant to the issue of constitutionality.⁴⁴⁹

3.8 CONSTITUTIONAL CONSTRAINTS

The ability of the courts to question and annul restrictions on freedom of speech is limited. The courts can only decide on the legality of restriction if it is not grounded on the criteria mentioned in the Constitution. So if the impugned law is a law relating to the subjects enumerated under the permitted restrictions found in Article 10 (2) (a), the question of its reasonableness does not arise. Even if the law were unreasonable according to a liberal judgment, it would still be valid. This is affirmed by the court in *Madhavan Nair v. PP*⁴⁵⁰ where the judge said that any condition limiting the exercise of the fundamental right to freedom of speech not falling within the four corners of Article 10 clause (2), (3) and (4) of the Federal Constitution cannot be valid.

The court in *Public Prosecutor v Pung Chen Choon* expresses the same attitude.⁴⁵¹ In this case the editor of a newspaper was prosecuted on the charge of maliciously publishing false news in the paper and thus committing an offence under section 8A (1) of the Printing Presses and Publications Act 1984. The court said that the scope of the court's inquiry is limited to the question whether the impugned law comes within the orbit of the permitted restrictions. Effectively, this excludes the power of the courts to enquire into the decisions of Parliament on the reasons for imposing restrictions. Nevertheless, a law which purports to have been passed under clause (2) of Article 10 is opened to challenge on the ground that it is not in any of the interests set out in the clause, since any other more extensive meaning to be assigned to Article 4 (2) (b) would render Article 10 (2) otiose.⁴⁵²

⁴⁴⁹ The Federal Court disagreed with the Court of Appeal findings. See [2004] 2 *MLJ* 257.

⁴⁵⁰ [1975] 2 *MLJ* 264, 264.

⁴⁵¹ [1994] 1 *MLJ* 566.

⁴⁵² Sheridan, L. A. and Grove, H. E. (1987) *Constitution of Malaysia*. Butterworth, 74.

In deciding whether a particular piece of legislation falls within the orbit of the permitted restrictions, consideration must be given to the objects of the impugned law. It must be sufficiently connected to the subjects enumerated under Article 10 (2) (a). The connection contemplated must be real and proximate, not far-fetched or hypothetical.

In addition, the exclusion of judicial scrutiny is also another form of constraint that can be found in Article 4 (2) (b). The article provides:

The validity of any law shall not be questioned on the ground that...it imposes such restrictions as are mentioned in article 10 (2) but those restrictions were not deemed necessary or expedient by Parliament for the purpose mentioned in that article.

The above provision excludes judicial review on any law that has a chilling effect on free speech. The effect of such a provision makes the courts reluctant to intervene in questioning the conduct of the executive or the restrictive law. In other words, judicial activism in this area is very limited.

The fundamental rights as enshrined in the Constitution will lose its vital characteristic if there is no check on the government or the legislature. The legislature and the executive are motivated more by political interest. This is because, for instance, the executive set policies and programmes, which they thought the best, in accordance with their political conviction in governing the country. Thus, the possibility to impose their own political agenda may affect the exercise of fundamental rights by the people. For instance, the prohibition on public rally during elections could hinder an opportunity for the opposition political parties to put their case to the public as enjoyed by the ruling party. The deployment of government agencies such as broadcasting and the press in favour of the ruling party creates an uneven level of playing field during election. Thus, the oppositions would be at a disadvantage position, as similar treatment is not given to them.⁴⁵³

⁴⁵³ In 2003, RTM broadcasted a programme to expose the dubious part of the main opposition party PAS. The same programme was broadcasted prior to the 1999 election.

The approach that the courts should adopt is to adhere not only to the letters of the Constitution but to the spirit as well. It can be argued that the courts can still scrutinise the restrictions by linking its connection with the stated interest. If no real connection exists between the restriction and the justificatory interests, then the restriction can be set aside as it impinges on the constitutional right.⁴⁵⁴

In addition, laws passed under Article 10 (2) can be challenged on the ground that it is not in any of the interests mentioned in the clause.⁴⁵⁵ Apparently there is a space for the courts to protect freedom of speech from arbitrary restriction imposed by the executive. The courts should make use of this avenue to project the image as the protector of fundamental liberties especially at times when its integrity is looked at with a jaundice eye.⁴⁵⁶

Limitation on freedom of expression on the ground of national security when there is no real threat to the security should be scrutinised by the courts. Even though the question of security remains with the executive, the question of whether a situation will jeopardise or relate to security, public order or moral is still for the courts to decide. For instance, the court in *Jamaluddin Bin Othman v Menteri Hal Ehwal Dalam Negeri & Anor*⁴⁵⁷ ruled that the allegations of fact upon which the Minister satisfactorily formed his decision could not be challenged for judicial review. However, this does not impede the court to look into the grounds of detention to consider whether the grounds fall within the scope of the law that is open to challenge. The issue in this case was whether the grounds of detention are inconsistent with Article 11, which guarantees freedom of religion, and thus outside the purview of the Internal Security Act 1960. The court held that the Minister has no power to deprive a person of his right to profess and practice his religion, which is guaranteed under Article 11 of the Constitution. The grounds of detention is outside the purview of the Act and therefore not valid.

⁴⁵⁴ Halsbury's Laws of Malaysia (2000) vol.2, *Malayan Law Journal*, 20.179.

⁴⁵⁵ Sheridan and Groves, op cit., n. 459, 73.

⁴⁵⁶ Abas, S. and Das, K. (1989) *May Day for Justice: The Lord President's Version*. Kuala Lumpur, Magnus Book. See also Hector, C. Mahathir and the judges: The Judiciary during the Mahathir Era. *Aliran Monthly* 2003:8. <http://www.aliran.com>

⁴⁵⁷ [1989] 1 MLJ 368.

A person can enjoy his constitutional freedom of speech as long as it is within the parameters set by Article 10 (2) (a). He can claim his constitutional right in case of breach and restrictions that are not founded on any of the exceptions. But the protection does not mean that a person can freely express himself because the protection not only confers right but also responsibility. The Constitutional protection ends once the legal parameters are encroached. Unbridled freedom of speech may destabilize the tolerance and harmony of a plural society. Therefore, the courts are ever watchful and maintain a firm hand to ensure that the concept of freedom of speech is not abused. The right to freedom of speech ought to be observed so long as no wrongful act is done.

The provision of Article 10 (2) makes Parliament as the final arbiter in determining whether restrictions are expedient or necessary. In this regard, Parliament is supreme as it can introduce any law for that matter. This is inconsistent with the notion of constitutional supremacy as proclaimed in Article 4 (1),

This Constitution is the supreme law of the Federation and any law pass after *Merdeka* Day, which is inconsistent with this Constitution, shall, to the extent of the inconsistency, be void.

Freedom to think as one likes and to speak as one thinks are indispensable to the discovery and spread of truth. Thus, without free speech, discussion in civil society may well be futile. But at the same time, we can only ignore at our peril the vital importance of our social interests. It is for this reason that the Constitution has rightly attempted to accommodate the various competing social interests. It has permitted imposition of restrictions on the citizen's right of freedom of speech and expression in the interest of, *inter alia*, national security, public order, decency or morality and impartial justice, to serve the larger collective interest of the nation as a whole. In this regard, the constitutional protection to free speech is predicated on the belief that the interest of the society as a whole necessitates the imposition of restriction on the freedom of expression.

3.9 FREEDOM OF THE PRESS

Freedom of speech and expression is the hallmark of an independent nation. The right is not absolute, as it cannot be accepted to confer a licence to violate the rights of others. Freedom of the press is part of the concept of freedom of speech under the Constitution. It is an indicator of a healthy democratic society.⁴⁵⁸ However, press freedom is not freedom from the law; it is freedom to act independently.⁴⁵⁹ Furthermore, it is also not absolute. The press has duties and responsibilities in disseminating balanced information, which the public can rely on to, form their judgments.

The role of the press is significant in a democratic society. The press serves as a public ‘watchdog’ alerting the public of any wrongdoings as well as a feeder of information to the public. Nevertheless, it may function as a ‘hound-dog’ harassing the public and intruding into their private lives. On the other hand, a free flow of information will also help the society to form intelligent judgment on issues of national interest. Thus, misinformation or bias in reporting will affect the public in making a misleading and wrong judgment.

The importance of the press has acclaimed itself a status as the ‘fourth estate’⁴⁶⁰ that makes it as important as other organs of the state. In order to be able to function and play its role, the press needs to be free. Freedom of the press does not only refer to the absence of prior restraint but also includes freedom to publish; and in relation to investigative journalism, freedom to report. Therefore, in order for freedom of expression to become meaningful, it is vital for the press to be free from unnecessary controls and restrictions.

⁴⁵⁸ Gomez, J. Contempt of Court- Freedom of Expression and the Rights of the Accused. (2002) 3 *MLJA* 241.

⁴⁵⁹ Giminez, E. J. Who Watches the Watchdogs? The Status of Newsgathering Torts Against the Media in Light of the Food Lion Reversal. (2001) 52 *Ala. L. Rev.* 675, 676.

⁴⁶⁰ This is the prevalent perception in the United States.

In Malaysia, there is no constitutional right to freedom of the press. As such the freedom acquires no specific constitutional protection. The Supreme Court in *Public Prosecutor v Pung Chen Choon*⁴⁶¹ expressed that:

Unlike the First Amendment to the Constitution of the United States of America, which makes express reference to the freedom of the press, the Constitution of Malaysia says nothing about the freedom of the press. The relevant portion of art 19 (1) of the Indian Constitution says this: 'All citizens shall have the right: (a) to freedom of speech and expression; ...'. Nevertheless, a consistent current of judicial opinion in India has established the proposition that art 19 (1) (a) includes within its ambit the freedom of the press.⁴⁶²

Whilst the courts would endeavour to ensure that the right to freedom of speech is protected, there is no special privilege accorded to the press.⁴⁶³ Legal protections to freedom of the press are available under the existing laws. The rights of the press are the same as available under the law to any other citizen. Freedom to write, publish and print does not entitle the press to damage the reputation of others, inciting communal agitation, inflame hatred speech and jeopardising the national security. The government perceives freedom of the press as a social responsibility rather than a right on its own. As such, the exercise of the freedom is subject to domestic law and can be curtailed by the ordinary law of the land.

The position of the press in Malaysia is that they enjoy a limited freedom. The Supreme Court judge Edgar Joseph Jr. expresses this where the press under the Federal Constitution is not as free as the press in other countries such as India, England and the United States.⁴⁶⁴ The press can exercise their freedom to the extent of the limit fixed by the law. The constitutional provisions as well as ordinary legislations are restricting freedom of speech and expression. By far and large, the constitutional restrictions on freedom of speech are applicable to the press as well.

⁴⁶¹ [1994] 1 MLJ 566.

⁴⁶² Ibid, 558.

⁴⁶³ *J Heng Consulting Services (M) Sdn Bhd & Anor v The New Straits Times Press (M) Bhd* (2003) 5 MLJ 481.

⁴⁶⁴ [1994] 1 MLJ 566, 576.

3.9 STATUTORY RESTRICTIONS

The main legislation that regulates the press in Malaysia is the Printing Press and Publication Act 1984. The Act imposes licensing requirement to publish newspaper. Application for the permit is within the discretionary power of the Minister whose decision cannot be challenged under judicial review.⁴⁶⁵ Section 5 (1) provides that:

No person shall print, import, publish, sell, circulate or distribute, or offer to publish, sell, circulate or distribute, any newspaper printed in Malaysia or Singapore unless there has been granted by the Minister in respect of such newspaper a permit under paragraph (a) or (b) of subsection (1) of section 6.

The absolute discretion of the Minister to grant or refuse a permit is stated in section 6, which reads:

(1) The Minister may in his absolute discretion grant –

(a) to any person a permit to print and publish a newspaper in Malaysia;

(2) The Minister may at any time revoke or suspend a permit for any period he considers desirable.

Thus, it is an offence to print and publish a newspaper without a permit. The punishment upon conviction is imprisonment for a term not exceeding three years or a fine not exceeding twenty thousand *ringgit* or both.⁴⁶⁶

The requirement for a permit is a prior-restraint on freedom of the press in Malaysia. The Minister is not obliged under the Act to give any reason for his decision in refusing or revoking a license or a permit. He can act on his own accord as the law grants him an absolute discretion.⁴⁶⁷ The Minister has the power to act without prior approval nor is he answerable to any person except Parliament.

⁴⁶⁵ Section 13A (1) of the Printing Presses and Publication Act 1984.

⁴⁶⁶ Ibid, section 5 (2).

⁴⁶⁷ Ibid, section 12 (2).

The discretionary power possessed by the Minister is beyond judicial review. He has the power to revoke or suspend any license or permit if he is satisfied that it is prejudicial to public order or national security. Section 13A (1) provides that:

Any decision of the Minister to refuse to grant or to revoke or to suspend a licence or permit shall be final and shall not be called in question by any court on any ground whatsoever.

There is a limited prospect in checking the power of the Minister under the Act. This is in relation to the offence of publishing false news.⁴⁶⁸ The written consent of the Public Prosecutor is necessary to constitute an action for malicious publication. In this regard, a check on the power of the Minister seems to exist when he cannot act alone in deciding an action against malicious publication. However, in practice this is unlikely because of the influential executive in Malaysia.

With such a discretionary power, the press cannot afford to be critical on issues that could affect the government and the ruling party. The threat of the power has reduced the potential of the press in creating a vibrant atmosphere for a democratic society. The government's power over licence renewal and other related policies creates an atmosphere that inhibits independent or investigative journalism. Consequently, the press practices extensive self-censorship.⁴⁶⁹ In order to avoid being shut down; media are less critical and monotonous in tandem with the aspiration of the ruling government. The press is heavily regulated by the requirements of the PPA. Thus, it makes the freedom of the press in Malaysia limited within the four corners of the law. In this context, Faruqi argues that in Malaysia there is freedom of speech but often no freedom after speech. Exerting political and legal pressure on journalists, which has led to a widespread self-censorship in their daily work, has often hindered freedom of the media in Malaysia.⁴⁷⁰

⁴⁶⁸ Section 8A (1) of the PPA.

⁴⁶⁹ Ong, T. K. Wake-up call for the Malaysian Media. *Sun2Surf*, 18 August 2004.

<http://www.sun2surf.com/article.cfm?id=4468> . See also Bari, A. Freedom of Speech and Expression in Malaysia. (1998) 3 *INSAF* 149, 158.

⁴⁷⁰ Faruqi, S. Free Speech and the Constitution. (1992) 4 *CLJ* 34.

Restrictions on freedom of the press imposed by the PPA had been challenged in *PP v Phung Chen Choon*.⁴⁷¹ In this case the defence had raised a question whether section 8A of the Act imposes restrictions on the right to freedom of speech and expression in violation of Article 10 (1) (a) and (2) (a) of the Federal Constitution and was therefore void under Article 4 (1). The Supreme Court ruled that section 8A (1) of the Act does impose restrictions on the right to freedom of speech and expression conferred by Article 10 (1) (a) of the Constitution. The Court also held that though malicious publication of false news falls within the orbit of the permitted restrictions under Article 10 (2) (a) of the Constitution, it could threaten national security and undermine the friendly relations with other countries. Therefore, section 8A of the Act could be supported as falling within the boundaries of permissible restrictions in Article 10 (2) (a) of the Constitution and was valid.

In relation to this, a visit was made in 1998 by the Special Rapporteur under the auspice of United Nation's Human Rights Commission concerning allegations of violations of the right to freedom of opinion and expression. The Special Rapporteur⁴⁷² in his findings on the state of freedom of expression in relation to the press discloses the use of control and laws to limit the freedom. Attention was drawn to the fact that all major daily newspapers are very closely tied to companies connected to political parties in the ruling Government, which makes the Malaysian press dependent upon the Government.⁴⁷³ Consequently, the newspapers provide uncritical coverage of government officials and give only limited and selective coverage to political views of the opposition or political rivals. Editorial opinions frequently reflect government positions on domestic and international issues.

This is apparent with the monopoly of news provider by the Malaysian National News Agency (Bernama).⁴⁷⁴ *Bernama* is a statutory body established under the *Bernama* Act 1967 with a role as the sole news and information provider in Malaysia. Even though the

⁴⁷¹ [1994] 1 MLJ 556.

⁴⁷² Report of the Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression submitted in accordance with Commission on Human Rights resolutions 1998/42. See Report on the mission to Malaysia. <http://www.ohchr.org/english/>

⁴⁷³ Ibid, para 45.

⁴⁷⁴ <http://www.bernama.com/about/about.htm>

subscription of the service is voluntary, most of the mainstream press is *Bernama*'s subscribers. The management of *Bernama* is under a Board of Governors, which comprises of a chairman and six members each from the Federal Government and the newspapers⁴⁷⁵ that subscribe to *Bernama*. The composition of its Board of Governors raises a question with regard to its independence in providing news and information. Most of the Governors are the representatives of the mainstream press controlled by the ruling party. Furthermore, the affairs of *Bernama* are being put under the Information Ministry portfolio. As such it is seen as one of the government's agencies rather than an independent news agency. Therefore, it is not uncommon for *Bernama* to exercise self-censorship in disseminating news and information taking into consideration of the extent of the government's control.

Restriction of the freedom of the press in Malaysia takes place in two stages. The first stage is the requirement for licenses and permits. In August 2001, the Deputy Home Minister said that his Ministry approved 2,141 publishing permits and 1,194 printing press licenses during the year.⁴⁷⁶ The figure is used to justify that the government practices a liberal approach in issuing the permits. However, the figure is misleading because although there is an increase in the quantity of permits but most of the new press, periodicals and magazines are controlled by the local media giants such as the New Straits Times Press and *Utusan Melayu*. In August 2000, the Minister in the Prime Minister's department responsible for legal affairs said that the PPA would not be repealed, even if a national press council were established to regulate the media.

Apart from the Printing Presses and Publication Act 1984, the press in Malaysia has to face other restrictive laws such as Sedition Act 1948, Official Secret Act 1971, Police Act 1967 and Internal Security Act 1960. In relation to sedition, publication of seditious tendency matters by the press is covered under the Sedition Act 1948. Section 3 of the

⁴⁷⁵ The representatives are from the New Strait Times, *Utusan Melayu*, The Star, Sin Chew Jit Poh, Borneo Post and The New Sabah Times which are controlled by the ruling political party.

http://www.bernama.com/bernama/lembaga_pengelola.html

See Nain, Z. (2002) *The Structure of the Media Industry: Implication for Democracy*. In Loh, F. and Khoo, B. T. Democracy in Malaysia: Discourses and Practices. Richmond, Curzon Press, 114-15. See also Nijar, G.S. Democracy and the Rule of Law in Malaysia. (1994) 23 *INSAF* 3, 10.

⁴⁷⁶ Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights, and Labor.

<http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8342.htm>

Act underlines six matters of seditious tendency which include disaffection against the Ruler or government, procuring alteration of Ruler or government by unlawful means, disaffection against the administration of justice, promoting ill-will and hostility between races and questioning the right, status, position, privilege, sovereignty or prerogative protected under Article 152, 153 or 181 and Part III of the Federal Constitution.

Raja Azlan Shah J has drawn the demarcation line between criticism and sedition in the case of *Public Prosecutor v Ooi Kee Saik & Ors.*⁴⁷⁷ In distinguishing between criticism and sedition the courts apply an objective test. The court emphasised on the effect of the impugned words by looking at the object of criticism. If the object is to obtain change or reform of the government policy or administration, then, it is not seditious in nature. But if the words have the tendency of stirring up hatred, contempt or disaffection against the government, then the Act will be applicable.⁴⁷⁸ The accused was alleged to utter the seditious words at a dinner held by an opposition party. The court held that the accused was guilty because the speech expressed a seditious tendency, accusing the government of gross partiality in favour of one group, and this was calculated to inspire feelings of enmity and disaffection among people of Malaysia.

The wide scope of seditious matters especially under section 3 (1) (e) and (f) of the Sedition Act 1948 has curtailed the freedom of the press to cover issues of public interest. The restriction imposed by excluding certain matters from public domain even if they are of public interest has limited the function of the press as the watchdog of the society. These matters are not only pertaining to political issues but also include a wide spectrum of social and economic issues. Previous issues such as the scandal of *Bumiputra* Malaysia Finance (BMF) which involved billions of *ringgit* and the failure and mismanagement of a state owned company *Perwaja* Steel and Bakun hydroelectric project are suppressed from the public knowledge even though these issues are of public and national interest. With the curtailment of the press freedom, the public will be deprived of the opportunity to know the true fact concerning their interest as these matters involved public money.

⁴⁷⁷ [1971] 2 MLJ 108.

⁴⁷⁸ See section 2 of the Sedition Act 1948.

The repercussion of the non-disclosure affects the level of public confidence in the transparency and integrity of the government.

There is no requirement of intention under the Sedition Act 1948. It is immaterial whether the impugned words are true or not. In *Public Prosecutor v Oh Keng Seng*,⁴⁷⁹ the accused argued that he had no intention of causing any racial trouble and his speech was a fair criticism of government policies. The court held that there is no obligation to prove that the speech is true or false or that it caused disturbance or a breach of peace. According to Raja Azlan Shah J the words of section 3 (3) and the subject matter repel any suggestion that such intention is an essential ingredients of the offence. In describing the concept of sedition within the local context, he said,

Our sedition law would not necessarily be apt for other people but we ought always to remember that it suits our temperament.⁴⁸⁰

The court adopts positive approach as far as seditious law is concerned particularly in relation to sensitive issues.⁴⁸¹ Emphasis is given to the letter of the laws rather than the rationale and philosophical foundation of the rights involved.⁴⁸² In *Lim Guan Eng v Public Prosecutor*,⁴⁸³ the appellant was charged with two offences. The first charge was under section 8A (1) of the Printing Presses and Publications Act 1984 for maliciously publishing false news in the form of a pamphlet entitled '*Mangsa Dipenjarakan*' (Victim Being Prisoned). The second charge was under section 4 (1) (b) of the Sedition Act 1948 for making a speech which contained seditious words. Both charges were with regard to the non-prosecution of an alleged rape case involving the former Chief Minister of Malacca with an under-aged girl.

However, in *Public Prosecutor v Param Cumaraswamy (No 2)*,⁴⁸⁴ the court found that the alleged statement did not have a tendency to promote ill will and hostility

⁴⁷⁹ [1979] 2 MLJ 174.

⁴⁸⁰ Ibid, 112. See also *Melan bin Abdullah & Anor v Public Prosecutor* [1971] 2 MLJ 280, 283.

⁴⁸¹ Halsbury's Laws of Malaysia. (2000) vol.2 MLJ para 20, 182.

⁴⁸² Bari, A. Freedom of Speech and Expression in Malaysia. [1998] *INSAF* 156.

⁴⁸³ [2000] 2 MLJ 577.

⁴⁸⁴ [1986] 1 MLJ 518.

between the different classes of the population. The appeal was directed at the Pardons Board not at the Ruler, in this case, the *Yang di-Pertuan Agong* (The King). Therefore, there can be no question of the statement having a tendency to bring hatred or contempt or to excite disaffection against the *Yang di-Pertuan Agong*. Disaffection, in the context of sedition, does not mean the absence of affection and regard; it means disloyalty, enmity and hostility. In this particular case the court concluded that the statement did not contain words, which were capable of advocating or encouraging the people to disloyalty. There was no tendency in the words that could create antagonism, enmity and disloyalty among the people.

Another piece of legislation that impinges freedom of the press is the Internal Security Act 1960. Originally, the Act was designed to prevent the communist insurgency after the independence in 1957. It deals with preventive detention promulgated under the purview of Article 149 of the Federal Constitution. The article protects the validity of the law even if it is inconsistent with fundamental liberties such as freedom of speech and expression. Section 8 (1) of the Act empowers the Minister of Home Affairs to detain any person without trial for up to two years. The section provides:

If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

Detention on security grounds was challenged in *Minister for Home Affairs v Jamaluddin bin Othman*.⁴⁸⁵ The grounds for the detention stated that the respondent was involved in a plan or programme to propagate Christianity among the Malays and it was also alleged that the activities of the respondent could give rise to tension and enmity between the Muslim community and the Christian community in Malaysia and could affect national security. The grounds for the detention in the present case read in the proper context are insufficient to fall within the scope of the Internal Security Act 1960, which is a piece of legislation essentially to prevent and combat subversion and actions prejudicial to public

⁴⁸⁵ [1989] 1 MLJ 368.

order and national security. The purposive interpretation of the law on security by the court has undermined the authoritative decision of the government.

In 1989, an amendment was made to the Act to include section 8B to prevent any challenge to the exercise of discretionary power by the Minister. The provision states:

There shall be no judicial review in any court, and no court shall have or exercise any jurisdiction in respect of any act done or decision made by the *Yang di-Pertuan Agong* or the Minister in the exercise of their discretionary power in accordance with the Act, save in regard to any question on compliance with any procedural requirement in the Act governing such act or decision.

The inclusion of the new provision prevents judicial ability to review the ground of detention as exercised by the court in *Jamaluddin Othman's* case. The wide power accorded to the Minister without the prospect of a legal challenge has diminished the constitutional rights of the people. It also reduces the vitality of the Constitution as the supreme law of the land, which is proclaimed to guarantee the fundamental liberties in Malaysia. In this regard, Faruqi argues that the principle of constitutional supremacy is more notional than real.⁴⁸⁶

The internal security law confers the Minister with full power to decide on the reasoning, manner and circumstances of detention.⁴⁸⁷ The executive whose interpretation on security is final determines the value of fundamental liberty to a certain extent. Salleh Abas LP in *Theresa Lim Chin Chin & Ors v Inspector General of Police*⁴⁸⁸ affirmed that 'judges in the matter of preventive detentions relating to the security of the Federation are the executive'.⁴⁸⁹ The unnecessary implication of the provision is that the judiciary is stripped off its power in upholding the fundamental rights as enshrined in the

⁴⁸⁶ Faruqi, S. Liberal enough to give life to the law. *The Star*, 2 February 2001, p.40.

⁴⁸⁷ The provision allows challenge on the legality of detention on procedural ground. However, according to Yatim the Internal Security Amendment Act 1989 disallowed judicial review in whatever form. See Yatim, R. (1995) *Executive Power in Malaysia*. Kuala Lumpur. Endowment Publication: 285.

⁴⁸⁸ [1988] 1 MLJ 293.

⁴⁸⁹ [1988] 1 MLJ 135, 295.

Constitution and thus, relinquished its function to the executive.⁴⁹⁰ In this regard, the notion of constitutional supremacy in Malaysia is difficult to maintain.

Even though the courts have no power to interfere in ascertaining what amounts to national security, they are not virtually powerless to decide cases under the ISA. The courts can always opt to rely on purposive approach in determining the actual purpose of a detention. If it can be proven that the purpose of a detention has no link with national security, then the courts can exert its judicial power to invalidate the detention. By doing so the courts are not interfering with the executive decision but are actually applying the law to check the abuse of power for ulterior motives. The nexus argument gives an opportunity to the courts to exert its independence as the last bastion of fundamental rights.

The Court in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Ors*⁴⁹¹ case used the nexus argument. The Court found that the purpose of the detentions was for ulterior purpose and not connected to national security. In this case, the appellants appealed against the decision of the High Court judge in refusing the writ of habeas corpus for their release. The appellants were arrested and detained under the Internal Security Act 1960 on the ground that they were planning a street demonstration in Kuala Lumpur. The respondent issued a press statement in relation to the detention revealing the appellants' involvement in militant activities that can jeopardise the national security. The court applied purposive approach in exerting its judicial power. In delivering the court's judgment, Steve Shim CJ said:

Although a court would not question the executive's decision as to what national security required, the court would nevertheless examine whether the executive's decision was in fact based on national security considerations. Here, the court was entitled to inquire the basis for the detaining authority's reasons to believe that the appellants had acted...in a manner prejudicial to the security of Malaysia.⁴⁹²

⁴⁹⁰ Sarwar, M. National Security & Fundamental Liberties: Are the Courts Striking the Right Balance? *Malayan Law Journal*, 4. <http://www.mlj.com.my/free/articles/malik&chris.htm>

⁴⁹¹ [2002] 4 MLJ 449.

⁴⁹² Ibid, 480.

On the other hand, section 22 of the Act accorded a discretionary power to the Minister in charge of Printing Presses and Publication. The power given to the Minister under this provision is wide and subjective. It authorises the Minister to decide the extent and context of the grounds. For instance, the Minister can impose absolute prohibition or condition on publication, on the grounds of disobedience to the law, incitement to violence, promoting feelings of hostility between races or classes of population or prejudicial to the national interest. The provision also covers every aspect of political, social and economic issues, which are the subjects of press coverage.

From the government's perspective, the ISA is a useful device imposed on the press in order to control them from indulging into sensitive issues that can destabilise social and political harmony.⁴⁹³ The intimidation by threatening to use the repressive laws causes the press, in particular the journalists, to exercise self-restraint. The restraint does not only involve editorial skill in the selection of news but also termination of employment.⁴⁹⁴

Besides legal intimidations, the arbitrary use of administrative action and condition restricts the freedom of the press in Malaysia. The practice of press accreditation by the Information Ministry poses difficulty for certain journalists⁴⁹⁵ to do their job. The accreditation is necessary for the press to gain access to press conferences or government sources of information. It is normally given to printing press licensed under the Printing Presses and Publication Act 1984. Thus, the unaccredited press⁴⁹⁶ has no opportunity to offer press coverage. To illustrate this point, in 2002 journalists from opposition party PAS and an independent on-line newspaper *Malaysiakini* were denied access to the Press

⁴⁹³ The Deputy Minister of Information once threatened to apply the Internal Security Act on local media and to censor foreign media for undermining the country's leadership. <http://www.rsfsf.fr>

⁴⁹⁴ In 1999 chief editors from local newspapers, *Utusan Malaysia* and *Berita Harian*, resigned due to political pressure because of their close association with the sacked Deputy Prime Minister Anwar Ibrahim. The sacking of Anwar Ibrahim caused political turmoil which contribute to the bad performance of the ruling party especially UMNO in 1999 general election.

⁴⁹⁵ There is no definition of journalist under the Printing Presses and Publication Act 1984.

⁴⁹⁶ On-line press such as *Malaysiakini* has been denied press accreditation because it is not covered by the Act.

gallery in Parliament on the basis that they were not accredited by the Information Ministry.⁴⁹⁷

It can be argued that the unequal treatment of the press raises a constitutional issue of equality before the law. Article 8 of the Federal Constitution guarantees that all persons are equal before the law. They are also entitled to equal protection of the law. Reliance on Article 8 is more promising if the treatment received by the press is based on the inclination of political decisions.

An issue relating to Article 8 was raised in the *Minister of Home Affairs v Aliran*.⁴⁹⁸ The respondents argued that refusal to grant the permit has the effect of discrimination and is therefore contrary to Article 8. But the court summarily rejected the argument and found that there was no infringement of any constitutional provision without offering further deliberation. In this case, the respondents had applied for a permit under section 6 (1) of the Printing Presses and Publications Act 1984 to print and publish in *Bahasa Malaysia* a magazine under the name of *Seruan Aliran*. The Minister of Home Affairs in accordance with his discretionary power refused the application. However, the decision was quashed by the High Court. On appeal, the Supreme Court held that section 12 (2) of the Printing Presses and Publications Act 1984 gives the Minister of Home Affairs 'absolute discretion to refuse an application for a licence or permit'. So unless it can be clearly established that the Minister for Home Affairs had in any way exercised his discretion wrongfully, unfairly, dishonestly or in bad faith, the Court cannot question the discretion of the Minister. The court in this case has missed the opportunity to determine the issues on constitutional ground decisively. The shallow consideration given by the court is viewed as most unsatisfactory.⁴⁹⁹ Nevertheless, the court acknowledged the possibility of judicial review of the discretionary power on the ground of wrongful, unfair and dishonest exercise of power.

⁴⁹⁷ Permission to attend parliamentary session was granted after protest from PAS on the ground that some of the Members of Parliament are from PAS. But *Malaysiakini* was granted conditional permission and restricted from asking questions during press conference or approach representatives of the ruling party. Reporters Sans Frontieres 2003 Annual Report, Malaysia. http://www.rsf.org/article.php3?id_article.

⁴⁹⁸ [1990] 1 MLJ 351.

⁴⁹⁹ Faruqi, S. Free Speech and the Constitution [1992] 4 CLJ lxiv, lxxiii.

Administrative actions can be invalidated on the premise of Article 10.⁵⁰⁰ In relation to administrative conditions imposed by the authorities, judicial review is possible on the ground that statutory powers must not be inconsistent with the constitutional requirements.⁵⁰¹ The court in *Chai Choon Hon v Ketua Polis Daerah Kampar*⁵⁰² decided that a restriction on the number of after dinner speakers at an event allowed by the authority was void as being unreasonable.

There is a shift in the courts attitude relating to reviewing the executive decision. The objective and purposive approach adopted by the Court in *Mohamad Ezam's*⁵⁰³ case is a clear departure from the previous subjective and positive approach in *Theresa's*⁵⁰⁴ case. The willingness of the Court to inquire into the legality of the executive's act is described by the former Chief Justice, Tun Mohd. Dzaiddin Abdullah, as 'most significant in putting in place the necessary principle of check and balance back into the governance and administration of Malaysia...'⁵⁰⁵

Restrictions on freedom of the press can also be made by way of suppression of documents and information. The Official Secrets Act 1972 (OSA) empowers the government to deal with documents and information that can be prohibited from public knowledge. Though the real purpose of the law is novel in protecting the national security, the scope and the extent of the power conferred on the government create a hindrance for the press to make a balanced coverage. Another concern is that the law is being used as a façade to protect interests that can frustrate the real objective of the existence of the law. According to the Preamble of the Act, the purpose of the law is to combat any attempt by civil servants from indulging in activities of spying and selling official secrets to foreign countries. The law is created to protect the country from those with ill intent to inflict harm by ways of espionage and spying. The law expressly states

⁵⁰⁰ Harding, A. (1996) *Law, Government and the Constitution in Malaysia*. London, 190.

⁵⁰¹ See *Madhavan Nair & Anor v Public Prosecutor* [1975] 2 MLJ 264 and *Lau Dak Kee v PP* [1976] 2 MLJ 229.

⁵⁰² [1986] 2 MLJ 203.

⁵⁰³ [2002] 4 MLJ 449.

⁵⁰⁴ [1988] 1 MLJ 293.

⁵⁰⁵ Abdullah, M. D. (2003) National Security Considerations under the Internal Security Act 1960- Recent Developments. Paper presented at a conference on "Constitutionalism, Human Rights and Good Governance". Kuala Lumpur, 30 Sept to 1 Oct 2003. <http://www.mlj.com.my/free/articles/dzaiddin.htm>

that it is an offence to possess and communicate any official secret. The meaning of official secret is provided by section 2 which include any document, information and material as may be classified as top secret, secret, confidential or restricted. The classification of official secret is vague and wide. It empowers the government to categorise any document as official secret. The Federal Court in the case of *Lim Kit Siang v Public Prosecutor*⁵⁰⁶ noted that the government is entitled to classify information in any way the government likes. This is due to the fact that all information that belongs to the government can be treated as secret. Any wrong classification on the part of the government does not render the information any less secret.

An issue of transparency and integrity of the OSA is raised when Mohd *Ezam*⁵⁰⁷, the Chief Youth of *Keadilan Nasional*, an opposition political party, exposed a document recommending legal prosecution against a senior Minister and a prominent politician for corruption by the Attorney General department. He was charged under the OSA but acquitted by the High Court. The use of the law as a political threat and intimidation to silence any critical expression against the government is not unprecedented.

The status of a secret document or information does not depend on its content or purpose. Once a document is classified as a government's secret pursuant to section 2B, then it remains so until it is declassified in accordance with section 2C. It is the form and manner in which the government treats a document or information that alleviates its confidentiality. In *Datuk Dzulkifli v Public Prosecutor*⁵⁰⁸ the court held that a document does not lose its status as a secret document merely because it is stolen and reproduced as a copy. The secrecy of a document is intact even if the public already knows its content.

The application of the law casts doubts about the transparency of the government. The control imposed on the press especially investigative journalism deprived the public of

⁵⁰⁶ [1980] 1 MLJ 293.

⁵⁰⁷ See *Utusan Malaysia* Online, 4 February 2005.

http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0416&pub=Utusan_Malaysia&sec=Dalam_Negeri&pg=dn_02.htm

⁵⁰⁸ [1981] 1 MLJ 112.

information that may affect their legitimate interests.⁵⁰⁹ Perhaps the cautious attitude of the press in publishing news on political issues is a factor for the lack of discussion pertaining to matters of public interest but deemed to be sensitive by the government.

Press freedom is not an objective right where it must be protected as the constitutional obligation of the government. The scope and limit of the freedom depend on freedom of expression and freedom of organisation. Therefore, journalists do not enjoy any special position or privilege in their works. They are subjected to the same law of the land as the ordinary man on the street. In a nutshell, the freedom of the press ends where the force of the law begins.

3.10 CONCLUSION

The constitutional protection accorded to the right to free expression creates an expectation that the right could be exercised without undue restrictions. It also gives the impression that the right has the exclusionary force that should be protected. However, there are other interests, public or private, that equally require protection in order to preserve the socio-political fabric of the Malaysian democratic society.

Though it is a noble idea that right-based approach as embraced by the Western liberal democracy should permeate the domestic constitutional framework, transplantation of such approach would be inappropriate as the Western approach is grounded on individualism in contrast with the communitarian impulse in the national constitutional design. In this relation, Schauer argues that cultural differences could influence the different emphasis on the epithet of free speech. Notably, constitutional constraints rest on culturally contingent social categories. Thus, it is better to help 'others to locate and manage their own categories than by trying to get them to accept ours.'⁵¹⁰

Communitarianism gives expression to the well-being of the society and the importance of the public interest. Malaysia emphasises on community right rather than individual

⁵⁰⁹ Nain, Z. (2002) *The Structure of Media Industry: Implication for Democracy*. In Loh, F. and Khoo, B. T. (eds.) *Democracy in Malaysia: Discourses and Practices*. Richmond, 111.

⁵¹⁰ Schauer, F. (1994) *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives*. Rosenfeld, 368.

rights as practiced in the West. But this does not negate the fact that Malaysia upholds human rights and fundamental freedoms.⁵¹¹ From the Malaysian constitutional perspective, protection of the public and society as a whole is paramount. For instance, the protection of freedom of religion under Article 11 of the Federal Constitution is imbued with communitarianism impulse. On this premise, the constitutional provision allows the existence and practice of minority faiths and religions such as Christianity, Buddhism and Hinduism alongside with Islam, which is professed by the majority.

On the other hand, majoritarianism gives expression to decisions that are based on majority rule.⁵¹² For the purpose of this study, majoritarianism in Malaysian context refers to the practice of parliamentary majority under the representative system. Though the concept takes into account the interest of the society, nevertheless, it gives primacy to the interest of the majority. This is evident when the Constitution gives primacy to *Bahasa Malaysia* (National language) which is widely spoken by the *Malays*, the majority race in Malaysian society. Another instance of majoritarianism practice is the creation of separate jurisdiction for the *Syariah* courts under Article 121(1A) of the Constitution. The effect of this is that the civil courts will no longer have the jurisdiction to hear cases pertaining to Islamic matters. Though both concepts communitarianism and majoritarianism give prominence to the society but the latter emphasises on the numerical aggregation of people in the society.

Malaysia could do better by resisting transplantation that prove to be incompatible with the local contingent and avoiding unacceptable relativism that may halt the potentially full-fledge progress of freedom. Since Malaysia has moved towards economic betterment, serious attention could be given to improve social and political rights such as right of privacy. Consequently, human rights could loom more prominently in Malaysian politico-cultural life.

⁵¹¹ Malaysian foreign affairs on human rights. See <http://www.kln.gov.my/english/Fr-foreignaffairs.htm>

⁵¹² <http://en.wikipedia.org/wiki/Majoritarianism>

CHAPTER 4

PRIVACY IN THE UNITED KINGDOM

4.0 INTRODUCTION

Traditionally, there is no legal protection to privacy as an independent right in the United Kingdom. Instead, English law affords protection to privacy interests in a piecemeal way.⁵¹³ Privacy as a separate law has never been recognised in the United Kingdom. Thus, right of privacy is not a ground that constitutes a cause of action in courts of law. Nevertheless, privacy-related interests are encompassed within other existing tort principles such as nuisance, trespass, defamation, malicious falsehood and breach of confidence. As such, English law does not afford protections for interference with privacy unless the interference involves wrongful act covered by the existing cause of action. The development of privacy in the UK has moved towards accepting the right particularly with the introduction of the Human Rights Act 1998. There is a significant stride in dealing with privacy under the Act when a paradigmatic shift occurs in the perception of privacy from a traditional negative right to a right-based impulse.

4.1 THE JUSTIFICATION

Privacy is a complex and elusive concept, which defies clear definition. Hence, it can be expected to exert 'chilling effect' on freedom of expression. Nevertheless, the difficulty to find a common foundation does not make the concept meaningless. The Younger Committee asserts that the need for privacy is nearly universal. The Committee observes that:

The quest and need for privacy is a natural one, not restricted to man alone, but arising in the biological and social processes of all the higher forms of life.⁵¹⁴

⁵¹³ Markesinis, B. Our Patchy Law of Privacy- Time to do Something About it. (1990) *MLR* 53, 802.

⁵¹⁴ Report of the Committee on Privacy. Cmnd. 5012, para 109.

Privacy sceptics argue that it should not be treated equally on the same platform as free speech.⁵¹⁵ This is because privacy is a concept, which relates to individualism rather than public in its collective entity. In other words, the benefit of privacy is for individual whereas free speech is for public good.

Moreover, the absence of clarification in the scope of privacy is a negating factor for privacy to be sidelined.⁵¹⁶ From the anthropological perspective, Moore argues that privacy is a socially created need. He observes that the diversity of desire and needs in societies influences the emphasis on privacy from one society to another and within the same society.⁵¹⁷ There is an expectation of degree of privacy in a person's private life that is not the legitimate concern of others.⁵¹⁸ Though privacy is rooted in individualism, it is implausible for a person to lead a hermetical life in today's society.

Conceptually, privacy can be classified into physical and informational privacy. Seclusion and solitude can be characterised under physical privacy that involves zone, limit or space.⁵¹⁹ Example of this type of privacy is the right to be let alone.⁵²⁰ On the other hand, anonymity, secrecy and intimacy can be under informational privacy that relate to dissemination of personal information. Wright argues that personal information relates to the intimate sphere of a person's life.⁵²¹ In order to be covered under the concept of privacy, the information must fulfill the requirements of intimate and acutely sensitive facts.⁵²² This kind of information has the capacity to embarrass or inhibit a person in the free development of one's personality and relationships with others. In this regard, privacy serves to protect information from the public gaze. It is unsatisfactory to confine the scope of privacy to information as privacy can also be invaded without involving personal information. For instance, invasion of privacy could be perpetrated through an unlawful body search.

⁵¹⁵ Wacks, R. The Poverty of Privacy. (1980) *LQ. Rev.* 73, 76.

⁵¹⁶ Ibid.

⁵¹⁷ Moore, B. (1984) *Privacy: Studies in Social and Cultural History*. New York, M.E Sharpe.

⁵¹⁸ DeCew, J. W. The Scope of Privacy in Law and Ethics. (1986) 5 *Law and Phil* 145, 169.

⁵¹⁹ Gavinson, R. Privacy and the Limits of Law. (1980) 89 *Yale L.J.* 420.

⁵²⁰ Winfield. Privacy. (1931) 47 *LQ Rev.* 23.

⁵²¹ Wright, J. (2001) *Tort Law & Human Rights*. Oregon, Hart Publishing.

⁵²² Parent, W. Privacy, Morality and the Law. (1983) *Philosophy and Public Affairs* 269. See Lusky, L. Invasion of Privacy: A Clarification of Concepts. (1972) 72 *Col. L. Rev.* 693.

4.1.1 AUTONOMY

Privacy is important and valuable for it empowers individual to exercise control on information about oneself. This is a manifestation of autonomous right or freedom of choice within society.⁵²³ In this context, Inness argues that privacy encompasses an autonomous right to make intimate decisions.⁵²⁴ Arguably, autonomy allows a person the right to make decisions on the extent of information that can be the subject of public perusal. Westin argues that autonomy is vital in the development of individuality particularly in a democratic society.⁵²⁵ Autonomy as the foundation for privacy received judicial recognition when Sedley L.J. in *Douglas v Hello! Ltd* stated that, ‘...privacy as a legal principle drawn from the fundamental value of personal autonomy’.⁵²⁶ The growth of individuality or human personality⁵²⁷ could inspire independent thought and instigate diversity of ideas and views that are important in a vibrant democracy. Autonomy also enables the protection of private sanctuary within which we shape our private lives and develop relationships with others.

On the other hand, an argument based on autonomy could frustrate the public’s right to know. There is a concern that autonomous power to determine information for public consumption would hinder discussion on matters that could be beneficial to the interest of the public. However, such a concern is misconceived since the autonomous individual decision-making could be exercised while respecting the legitimate interests of others.⁵²⁸

4.1.2 DIGNITY

Justification for privacy could also be found in human dignity.⁵²⁹ Dignity as a value worth protected give impulse to the important of privacy in a democratic society.⁵³⁰

⁵²³ Hirsleifer, J. Privacy, Its Origin, Function and Future. (1980) 9 *Jo. LS* 649.

⁵²⁴ Inness, J. (1992) *Privacy, Intimacy and Isolation*. Oxford, 46-47.

⁵²⁵ Westin, A. (1970) *Privacy and Freedom*. London, 34.

⁵²⁶ [2001] 2 WLR 992, 1025.

⁵²⁷ Wright, op cit., n. 525, 163.

⁵²⁸ Rehm, G. M. (2001) *Privacy in the Digital Age: Vanishing Into Cyberspace?* In D. Friedmann and D. B. Erez, (eds.) *Human Rights in Private Law*. Oxford, 376.

⁵²⁹ Bloustein, E. Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser. (1964) 39 *NYULR* 962.

⁵³⁰ Rogers, H. and Tomlinson, H. Privacy and Expression: Convention Rights and Interim Injunctions. (2003) *EHRLR* (Special Issue) 37, 38.

Feldman admits that dignity is an important value for human rights law but at the same time cautions the right to dignity due to its complexity.⁵³¹ Reliance on dignity does not make privacy as a primary right but undoubtedly would upgrade the value of the right to privacy. The justification of dignity received judicial recognition when Sedley LJ in *Douglas v Hello!* stated that:

Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity--the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.⁵³²

Dignity is not a concept born purely of history and tradition. Every individual holds dignity interests by virtue of being alive and human.⁵³³ Though society is made up of individuals who enjoy interests collectively as a society, yet, individuals' independent interests may conflict with the collective interests of society. In this context, an individual's dignity interest may conflict with the press freedom in informing the public on matters concerning them. For instance, an exposé of true personal information of public figures such as a politician who is involved in extra-marital affairs could be injurious to his dignity yet informative to the public particularly in his constituency. Such information could be of public interest in a representative system.

In addition, dignity is also a core interest in relation to patients' privacy. Arguably, in relation to this, it is the dignity of AIDS patients or rape victims⁵³⁴ that warrant protection of informational privacy. Nonetheless, the court in *Campbell v MGN*⁵³⁵ found that the protection of medical data is of fundamental importance to a person's enjoyment of his or her right to respect for private life. It could be argued that to expose a humiliating or embarrassing personal fact which is true may injure dignity but not reputation. Unlike reputation, which can be redeemed under the protection of defamation law, dignity is unredeemable once it is lost. Perhaps the dignitarian interest justifies the necessity to

⁵³¹ Feldman, D. Human Dignity as a Legal Value- Part II. (2000) *PL* 61, 75.

⁵³² [2001] QB 967, 1001. See also *Campbell v MGN* [2004] 2 AC 457, 472.

⁵³³ Jones, J. Common Constitutional Traditions: Can the Meaning of Human Dignity Under German Law Guide the European Court of Justice. (2004) *PL* 167, 170.

⁵³⁴ See per Lord Hutton in *R v A (No 2)* [2002] 1 AC 45, 98.

⁵³⁵ [2004] 2 WLR 1232. See also *Z v Finland* (1998) 25 EHRR 371.

protect privacy as a fundamental right in a democratic society as embedded in the ICCPR and the ECHR.

4.2 PROTECTION OF PRIVACY BEFORE THE HUMAN RIGHTS ACT

Even though privacy is not recognised as a separate law, it is nevertheless not an alien concept in the United Kingdom. In 1361, the Justices of the Peace Act in England provided for the arrest of peeping toms and eavesdroppers. This means that privacy interests have been safeguarded even before the Human Rights Act 1998, though not as a distinctive right, but as a value associated with personal autonomy and human dignity.⁵³⁶

John Stuart Mill, an English philosopher in the 19th century, said in his *Essay on Liberty*:

In the part that merely concerns him, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.⁵³⁷

Notably, privacy is an important value in English culture, asserted under local customs. For instance, in *Hale's* case 1569, the defendant pleaded a custom of London for freeholders to build new houses that could block the lights from entering their neighbour's house.⁵³⁸

Leggatt LJ described the absence of the right as a 'shortcoming in our law'.⁵³⁹ There are several reasons why there is no right of privacy in the United Kingdom. One of the reasons is that first; privacy has not acquired the primary right that warrants legal protection. This is because other core interests eclipse the importance of privacy in English culture. For instance, the English legal tradition is more concerned to protect property rights and physical rights.⁵⁴⁰ These rights work to protect certain aspects of privacy. Hence, protection of privacy interest is parasitised on the assertion of proprietary rights or other property interests.⁵⁴¹ The popular maxim 'an Englishman's

⁵³⁶ Feldman, D. Secrecy, Dignity or Autonomy? Views of Privacy as Civil Liberties. (1994) 47CLP42, 54.

⁵³⁷ Gray, J. (1991) *John Stuart Mill on Liberty*. Oxford, 14.

⁵³⁸ Baker, J.H. and Milsom, S.F.C. (1990) *Sources of English Legal History*. London, 592.

⁵³⁹ *Kaye v Robertson* [1991] FSR 62, 71.

⁵⁴⁰ Feldman, D. (2002) *Civil Liberties and Human Rights in England and Wales*. London, 543.

⁵⁴¹ Robertson, G and Nicol, A. (2002) *Media Law*. London, 281.

house is his castle', which is used in relation to an act of intrusion, explains the strong attachment of the law on property interest.

This strong attachment also proves that right of privacy exists in a surrogate form. For instance, an owner of private property may assert privacy to prevent intrusion. In the case of *Williams v Settle*,⁵⁴² the defendant was a photographer engaged by the plaintiff. When the plaintiff's father was found murdered, it attracted a lot of publicity. Some photographs took by the defendant were sold to newspapers without authority and one was published in the newspapers. The defendant admitted that the copyright in the photographs belongs to the plaintiff. The lower court awarded punitive damages because of the scandalous behaviour of the defendant. The Court of Appeal in upholding the award of punitive damages emphasised that:

They may act as a deterrent to others who are willing to supply to the Press information which they know is going to be used in a manner which will be so hurtful and distressing to the people involved.⁵⁴³

The second reason for the lack of right of privacy is the absence of a positive right protection. Without such protection privacy is regarded as a residual interest that can be outweighed by other countervailing interests. Moreover, the residual character suppresses the value of privacy where the benefit is limited to personal interest, which may not outweigh other interest beneficial to the public at large. A Bill of Right or a statutory legislation would grant a positive right status to privacy. Thus privacy can be better protected. Without such protection, privacy would be a subservient instead of being an exception to other valuable interests such as freedom of expression. Any law pertaining to protection of privacy is perceived as a threat and would have a chilling effect on freedom of expression. As such, restriction on freedom of expression would be regarded as taking a step backward. In relation to the press, the last prior restraint law was terminated in the 17th century.⁵⁴⁴

⁵⁴² [1960] 1 WLR 1072.

⁵⁴³ Ibid, 1081.

⁵⁴⁴ Press licensing was ended in 1694. See Curran, J. and Seaton, J. (1991) *Power Without Responsibility: The Press and Broadcasting in Britain*. London, 1.

The third reason is the strong attachment of the English legal culture to the notion of parliamentary sovereignty. This doctrine empowers Parliament with unlimited legal power to do anything it wishes.⁵⁴⁵ Under this notion, political dominance by the ruling party can shape and influence the decision-making process.⁵⁴⁶ For instance, in realising their commitment toward civil liberties, the Human Rights Act 1998 was introduced by the current Labour government after they came into power.⁵⁴⁷ Recently, the government reiterated its unwillingness to introduce privacy law.⁵⁴⁸ However, Dworkin argues that Parliament should be under law.⁵⁴⁹ This will allow the courts to scrutinise the legislations passed by Parliament.

Bagshaw argues that among the obstacles in introducing legislative protection of privacy is the weakness of the legislature when faced by hostile media and the government's dominant power.⁵⁵⁰ Political pressure from those with vested interest, especially the press, could influence the government to forestall the introduction of law on privacy.⁵⁵¹ The press forms a hegemonic force when it comes to protecting freedom of the press. This is evident when the press succeeded in lobbying for the inclusion of section 12 in the Human Rights Act 1998.

The fourth reason is the strong and influential press in upholding freedom of the press. Markesinis argues that the real reason for the absence of the law on privacy is the blocking power of the press. According to him, the press has relied on the difficulty to define privacy and the inhibitive effect privacy has on investigative journalism to resist

⁵⁴⁵ According to this doctrine, individuals may say or do what they please only in accordance with the substantive law. See Mullender, R. *Parliamentary Supremacy, the Constitution and the Judiciary*. (1998) 45 *NILQ* 138. See also Lord Lester and Oliver, D. (1997) *Constitutional Law and Human Rights*. London, 93.

⁵⁴⁶ Lord Bingham of Cornhill, *The Way We Live Now: Human Rights in the New Millennium*. (1998) 1 *Web JCLI*. <http://webjcli.ncl.ac.uk/1998/issue1/bingham1.html>

⁵⁴⁷ Real rights for citizens. Labour party manifesto 1997. <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml>

⁵⁴⁸ The Government's Response to the Fifth Report of the Culture, Media and Sport Select Committee on Privacy and Media Intrusion (HC 458-1), Cm 5985. <http://www.culture.gov.uk>

⁵⁴⁹ Dworkin, R. (1990) *A Bill of Rights for Britain*. London, 14

⁵⁵⁰ Bagshaw, R. (1997) *Obstacles on the Path to Privacy Torts*. In Birks, P. (ed.) *Privacy and Loyalty*. Oxford, 137-38.

⁵⁵¹ Hartman, C. J. The Emergence of a Statutory Right to Privacy Tort in England. (1995) 16(1) *J.L.M. & P.*, 17.

the law of privacy.⁵⁵² The exercise of self-regulation through the Press Complaint Commission has so far been able to resist the introduction of law on privacy. The press survived the threat of introducing the law of privacy by reviewing the Press Complaint Commission to the satisfaction of the government.⁵⁵³ In 1995, the government rejected the proposal for introducing a general right to privacy following the consultation paper by the Lord Chancellor's Department in 1993.⁵⁵⁴

4.2.1 JUDICIAL RECOGNITION

The complexity of right of privacy does not diminish the value of privacy. Even the skeptic of the right, such as Professor Raymond Wacks,⁵⁵⁵ argued that the problem is not that privacy is without value, but the existence of hybrid values under the canopy of privacy makes the concept inept for practical work. Nevertheless, the right of privacy is recognised as a protected right under the European Convention on Human Rights. Unfortunately, similar protection is elusive in the UK amidst the incorporation of the Convention rights by the Human Rights Act 1998.

The need to protect privacy has received considerable supports from the public as well as the judges.⁵⁵⁶ For instance, concerns on potential abuse and intrusion of privacy are the main reason for Liberty, a human rights movement, opposing the government's proposal to introduce identity card for the citizens.⁵⁵⁷ Browne-Wilkinson VC stressed the importance of privacy in *Marcel v Commissioner of Police for the Metropolis* when he said:

If the information obtained by the police, the Inland Revenue, the social security offices, the health service and other agencies were to be gathered

⁵⁵² Markesinis, B. Our Patchy Law of Privacy- Time to do Something about it. (1990) *MLR* 53.

⁵⁵³ David Mellor, the then Home office minister, in 1989 said that the press was 'drinking the last-chance saloon'. See Calcutt, D. (1990) *Privacy and Related Matters*. Cm. 1102.

⁵⁵⁴ Department of National Heritage. (1995) *Privacy and Media Intrusion: The Government's Response*. Cm. 2918.

⁵⁵⁵ Wacks, R. The Poverty of Privacy. (1980) 96 *LQR* 73. Thomson, J. The Right to Privacy. (1975) 4 *Philos Pub Aff* 295.

⁵⁵⁶ See for instance per Sedley LJ in *Douglas v Hello!* [2001] QB 967.

⁵⁵⁷ Identity cards. Liberty. <http://www.liberty-human-rights.org.uk/privacy/id-cards.shtml>

together in one file, the freedom of the individual would be gravely at risk.
The dossier of private information is the badge of the totalitarian state.⁵⁵⁸

The courts also consider right of privacy in considering other remedies. This can be seen in the case of *Prince Albert v Strange*⁵⁵⁹ where Knight Bruce V.C. described the case as a ‘sordid spying into privacy of domestic life’. Furthermore, in *Kaye v Robertson*⁵⁶⁰ Bingham LJ described the defendant’s conduct towards the plaintiff as ‘monstrous invasion of his privacy.’⁵⁶¹

The absence of law of privacy does not mean that the right itself is absent in the domestic legal arena. In the case of *Schering Chemicals v Falkman*,⁵⁶² Lord Denning said ‘While freedom of expression is a fundamental human right, so also is the right of privacy.’ The same sentiment expressed by Lord Keith when he said that ‘...the right to personal privacy is clearly one which the law should in this field seek to protect.’⁵⁶³

The implementation of Human Rights Act in October 2000 has provided a stimulus for the notion of respect for privacy as an underlying legal value.⁵⁶⁴ It encourages the development of common law principles particularly the breach of confidence⁵⁶⁵ in providing protection. In *Spencer v UK*⁵⁶⁶ the government argued that breach of confidence provides the necessary remedy for domestic privacy matters. The court dismissed the application on the ground that the applicant had not exhausted local remedy. The incorporation of the right into domestic legal landscape serves as catalyst for the emergence of right of privacy under common law principles. It is unfortunate for the

⁵⁵⁸ [1992] Ch 225.

⁵⁵⁹ (1848) 2 De G. & Sm, 652.

⁵⁶⁰ [1991] FSR 62.

⁵⁶¹ See *Berstein v Skyview Ltd* [1978] QB 479. Griffith J. used the same expression and rejected the claim based on trespass and invasion of privacy.

⁵⁶² [1982] QB 1, 21.

⁵⁶³ *AG v Guardian Newspapers Ltd (No.2)* [1990] 1 AC 109, 255.

⁵⁶⁴ Lord Phillips MR in *H (a Healthcare Worker) v Associated Newspapers Ltd* [2002] EWCA Civ 2081, para 40.

⁵⁶⁵ Phillipson, G. and Fenwick, H. Breach of Confidence as a Privacy Remedy in the Human Rights Act Era (2000) *MLR* 63, 449. See also Loon, N. W. Emergence of a Right to Privacy from within the Law of Confidence. (1996) 18(5) *EIPR* 307. Schilling, K. Privacy and the Press: Breach of Confidence- The Nemesis of the Tabloids. (1991) *Ent.L.R.* 2.

⁵⁶⁶ (1998) 25 EHRR CD 105.

English legal system if a citizen has to seek remedy in the ECtHR on the ground of lack of local remedy.

The Human Rights Act 1998 incorporates privacy, which is part of the Convention rights. The scheme of the Act protects rights against the state infringement (vertical effect). The scheme is not in parallel with the nature of the right of privacy, which relates to individuals *inter se* (horizontal effect). However, there is a possibility for the horizontal effect under the Act. This is so when the Act creates a duty on public authorities to act compatibly with the Convention rights. As this issue is of grave concern, it will be discussed in the later part of this chapter.

Judicial activism has made protection of privacy possible. This has enabled the existing legal principles to become the framework for the protection of privacy. The strongest judicial recognition appears in the remark of Lord Phillips in *Campbell v MGN* when he said:

The development of the law of confidentiality since the Human Rights Act 1998 came into force has seen information described as "confidential" not where it has been confided by one person to another, but where it relates to an aspect of an individual's private life which he does not choose to make public. We consider that the unjustifiable publication of such information would better be described as breach of privacy rather than breach of confidence.⁵⁶⁷

The judicial remark evinces that right of privacy in the UK has gained considerable support and recognition, which is moving towards its institutionalisation.

4.2.2 EFFORTS TO INTRODUCE PRIVACY LAW

Several efforts have been made to introduce right of privacy into the domestic legal landscape. The widespread concerns among the public and members of Parliament about press abuses reached its peak with the introduction of several bills on privacy.⁵⁶⁸ The failure could be attributed to a succession of governments' position on the matter. For

⁵⁶⁷ [2003] QB 633, 663

⁵⁶⁸ Lord Mancroft's Bill (1961), Mr. Lyon's Bill (1967), Mr. Walden's Bill (1969), Mr. Cash's Bill (1987), Mr. Browne's Bill (1988) and Lord Stoddard's Bill (1989).

instance, the bill introduced by Brian Walden MP was abandoned because the government undertook to appoint a committee to inquire into the protection of privacy.⁵⁶⁹

The lack of serious commitment by the government to legislate privacy law may also be due to the fear of press hostility.⁵⁷⁰ The reason for the unwillingness to introduce privacy law is because of the apparent conflict with freedom of expression. It is remarkable that English law, which in many other fields has kept pace with changes in the public mores, should have so far failed to evolve any general concept of privacy.⁵⁷¹ Hostile reactions especially from the press towards the prospect of law on privacy are obvious.⁵⁷² For instance, Lord Wakeham in his final speech as the chairman of the Press Complaint Commission said:

A privacy law would provide a severe blow to the ability of newspapers to investigate, scrutinise and where necessary intrude in the public interest. The freedom of the press, which has been a central plank of Britain's democracy since 1689, would be seriously eroded.⁵⁷³

This is a typical justification for defending freedom of the press. Admittedly, the role of the press is vital for a healthy democratic society. But it does not make the press a distinct entity in a civil society. The press has its share in duties and responsibilities. Perhaps the remark by Lord Wakeham is a mere *in terrorem* rhetoric.

In the past, six private member's bills on privacy have been introduced in Parliament. However, none has gone through to create a new legislation. Discussions and proposals on right of privacy have been made in seven major reports since 1970. The first main report to enhance privacy protection was made by Justice, the British section of the International Commission of Jurists.⁵⁷⁴ The report concluded that the fragmentary and incomplete protection of privacy under the English law is certainly inadequate. The

⁵⁶⁹ Michael, J. (1994) *Privacy and Human Rights*. Aldershot, Dartmouth, 101.

⁵⁷⁰ Fenwick, H. (2002) *Civil Liberties and Human Rights*. London, Cavendish, 537.

⁵⁷¹ Neill, B. The Protection of Privacy. (1962) *MLR* 26, 400.

⁵⁷² Privacy has been labeled as bourgeois right and blockbuster tort.

⁵⁷³ 'Press, Privacy, Public Interest and the Human Rights Act'. Lecture given on 23 January 2002.

⁵⁷⁴ Littman, M. and Carter-Ruck, P. (1970) *A Report by Justice: Privacy and the Law*. London, Stevens & Sons Limited.

report found that the English law protects a man's person, property and reputation, but it does not specifically protect his privacy.

4.2.3 REPORTS ON PRIVACY

In 1972, the Younger Committee produced a report on privacy.⁵⁷⁵ The main task of the Committee is 'to consider whether legislation is needed to give further protection to individual citizen and to commercial and industrial interests against intrusion into privacy by private persons and organizations, or by companies, and to make recommendations.'

In general, the Committee noted that privacy is an important aspect of life. However, the Committee opined that there is no need for a general law of privacy because the effect of such law on other rights of great importance is unpredictable. The Committee also found that the difficulty to define right of privacy in a precise term is a hindrance to develop a satisfactory law. The Committee then suggested that public disclosure of private information could be addressed within the ambit of breach of confidence. It also suggested a study by the Law Commission into expanding its coverage in a new statutory tort action.

In 1989, the government appointed the Calcutt Committee to investigate press intrusions into privacy. The appointment of the Committee was a reaction to the Right of Privacy Bill in 1989. Unlike previous Bills on privacy, the Bill presented by Mr. Browne MP had passed through the Committee stages in the Commons. In its Report on Privacy and Related Matters, the Committee recommended against the creation of a new statutory tort of invasion of privacy relating to publication of personal information. The Committee viewed that it would be possible to define invasion of privacy with sufficient precision. The definition relates only to information that is published without authorisation. The Committee recommended that a Press Complaints Commission replace the existing Press Council. If the establishment of the Commission does not materialised, then an alternative statutory body would be required. As such, this is regarded as the last

⁵⁷⁵ Younger, K. (1972) *Report of the Committee on Privacy*. London, HMSO.

opportunity for the press to improve the self-regulatory body in adjudicating complaints from members of the public.

In 1992, Sir David Calcutt was asked to review the performance of the new Press Complaints Commission (PCC).⁵⁷⁶ The review of Press Self-Regulation report was presented to Parliament amidst public debate about press abuse of individual privacy. In the review, Calcutt concluded that the new Press Complaint Commission was not proven effective and that a statutory body should be established. There was a drastic change of position in the report from the previous one in relation to privacy law. Calcutt found that the time had come for the introduction of a new law on privacy. This was due to the ineffectiveness of the self-regulatory body in dealing with the press.

National Heritage Committee produced privacy and Media Intrusion report in 1993. Privacy issues covered by the Committee were not limited to the print media. Its main overriding concerns were the privacy of private citizens and the use of invasive technology. Although the Committee agreed with Sir David that the Press Complaints Commission is not an effective regulator, they however, did not agree that a statutory press complaints tribunal should be established. In addition, the Committee was in favour with the monitoring approach over the performance of PCC. The Committee recommended a Protection of Privacy Bill, which would protect all citizens from infringement of privacy. The proposed civil offence in the Bill covers publication of personal materials, private information, misleading personal information and violation of peace by intrusion.

The Committee also viewed that the law of confidence in relation to the proposed civil offence of infringement of privacy has not been fully appreciated. Therefore, the Committee recommended that further consideration should be given to introduce legislation on breach of confidence.

In 1995 the Government responded to the reports made by the Select Committee as well as the review by Sir David. The Government then declined the statutory measures

⁵⁷⁶ Calcutt, D. (1993) *Review of Press Self-Regulation*. London, HMSO.

proposed earlier. The statutory controls would make the Government susceptible to charges of press censorship. The Government was unwilling to subscribe to the recommendations because of a long-standing reluctance to introduce statutory control of the press. The Government concluded that self-regulation is preferable by taking into considerations the improvements in procedures and practices, which the PCC has introduced over the past two years.

Following this in 2003, the Culture, Media and Sport committee was appointed by the House of Commons to focus on matters relating to privacy and media intrusion. The measures recommended by the Committee are aimed to clarify the protection that individuals can expect from unwarranted intrusion by anyone into their private lives. The Committee firmly recommends the Government to reconsider its position and bring forward legislative proposals to protect the right of privacy. This is necessary to satisfy the obligation of the United Kingdom under the European Convention of Human Rights.⁵⁷⁷

4.2.4 JUDICIAL AND EXTRA-JUDICIAL SUPPORT

It would be a misleading notion to say that English law has not protected privacy interest. On a number of occasions judges have referred to right of privacy in the course of considering other courses of action. The courts have increasingly regarded privacy as fundamental and an interest that the law should protect. This judicial recognition has made the prospect of having legal protection in the United Kingdom as promising. In this relation, Lord Phillips MR said:

The development of the law of privacy, under the stimulus of the Human Rights Act, under which the possibility of a new civil law right is being recognised as one that can be legitimately protected by the grant of an injunction.⁵⁷⁸

The views expressed by the judges emphasised that privacy is as important as other rights. However, the courts did not go further in the development of privacy when it

⁵⁷⁷ Kaufman, G. (2003) *Privacy and Media Intrusion. Fifth Report*. London: Stationary Office Ltd.

⁵⁷⁸ *H (A Healthcare Worker) v Associated Newspapers Limited* [2002] EWCA Civ 195, para 40.

declined the opportunity to fashion a new law. The court in *Kaye v Robertson* maintains the legal status quo on privacy.⁵⁷⁹ The Court of Appeal in this case decided that there is no right of privacy in English law. In this case, an actor involved in an accident was hospitalised after surgery. He was photographed and interviewed by a tabloid newspaper. His claim for infringement of privacy was rejected. Leggatt L.J. said that the right ‘has so long been disregarded here that it can be recognized now only by the legislature.’⁵⁸⁰ All three judges acknowledged the right of privacy but that alone does not entitle a person to relief in English law. Thus, privacy might be lacking distinctive legal right but not the value of moral right. Laws J. expressed that ‘the law would protect what might reasonably be called a right of privacy, although the name accorded to it would be breach of confidence.’⁵⁸¹

Despite considerable emphasis on the interest of privacy by the courts, a distinct law of privacy is still not forthcoming.⁵⁸² The reluctance of the courts to declare a new law on privacy is due to the expectation that the government would initiate the cause.⁵⁸³ The inclination is that the government should pronounce the new law. But since the government has expressed its unwillingness to introduce privacy law,⁵⁸⁴ the existence of privacy as legal redress could be fashioned by the courts.

The courts have two options to provide legal redress for invasion of privacy.⁵⁸⁵ First, by develop incrementally the existing common law principles as the framework for privacy such as breach of confidence on the basis of a case.⁵⁸⁶ Second, proclaiming privacy as a distinct cause of action which is independent of the existing framework.⁵⁸⁷ Though the first option is credible on the basis of established principles, there is a question of effectiveness. For instance, the scope of breach of confidence may only cover an aspect

⁵⁷⁹ [1991] FSR 62.

⁵⁸⁰ Ibid, 71.

⁵⁸¹ *Hellewell v Chief Constable of Derbyshire* [1995] 1 All ER 473.

⁵⁸² *Wainwright v Home Secretary* [2003] UKHL 53. *A v B plc* [2003] QB 195. *Theakston v MGN Ltd* [2002] EMLR 22 and *Peck v UK* (2003) 36 EHHR 41.

⁵⁸³ Hartman, C. The Emergence of a Statutory Right to Privacy Tort in England. (1995)16 *J.L.M. & P.*,10.

⁵⁸⁴ The Government’s Response to the Fifth Report of the Culture, Media and Sport Select Committee on Privacy and Media Intrusion (HC 458-1), Cm 5985. <http://www.culture.gov.uk>

⁵⁸⁵ Tomlinson, H., (2002) *Privacy and the Media*. Oxford, 10

⁵⁸⁶ This approach is currently being adopted by the English courts.

⁵⁸⁷ The Younger Committee and the Calcutt Committee recommended against a general right of privacy.

of privacy dealing with private information. On the other hand, the second option could provide certainty in protecting privacy. Its effectiveness may be maintained because it is structured on privacy-related issue. The latter option can be modeled on Prosser's taxonomy who had categorized privacy issues into four distinct torts:⁵⁸⁸ (1) intrusion on seclusion, solitude, or private affairs; (2) publication of embarrassing private facts about plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; (4) appropriating the plaintiff's name or likeness for the defendant's advantage.

Nevertheless, the creation of the law by the legislature is deemed to be more appropriate.⁵⁸⁹ The 'wait and see' attitude of the courts in creating a new cause of action is pending on the government's response.⁵⁹⁰ As suggested by Legatt L.J. that 'it is to be hoped that the making good of this signal shortcoming in our law will not be long delayed.' Unfortunately, the delay is longer than it was thought.

Consequently, the formation of several committees to look into privacy matters has indirectly contributed to prolong the delay. In this context, the government's reaction to the recommendations for such a law may seem to be an act of deference on the government's part. It is as if the government is buying time in order to ease the tension between the protection of privacy and freedom of expression.⁵⁹¹ Barendt and Hitchens suggest that the unwillingness of the government to establish a privacy right is to avoid the wrath of the press.⁵⁹² The lack of serious commitment towards legislating law on privacy, suggests that the government's primary motivation may have been to stall privacy legislation.⁵⁹³ This reflects the state of ambivalence on the government's part on one hand, admitting desirability to safeguard privacy but on the other, not its availability.

⁵⁸⁸ Prosser, W. Privacy. (1960) 48 *Cal. LR* 383.

⁵⁸⁹ This is unlikely because the government did not give its support to the previous Rights of Privacy Bills.

⁵⁹⁰ Lord Kilmuir LC said in relation to right of privacy as a matter which the judges 'might have at any time to decide.' See Hansard, HL 1961, 295.

⁵⁹¹ The appointment of the Calcutt Committee was a reaction to private members' bills rather than a government initiative. The real problems with regard to privacy law are political rather than technical. See *The Economist* November 19th 1994 at 35.

⁵⁹² Barent, E. and Hitchens, L. (2000) *Media Law: Cases and Materials*. Harlow, 39 and 401. See also n 15 in chapter 10 of Fenwick, H. (2002) *Civil Liberties and Human Rights*. London, 537.

⁵⁹³ Whitty, N. et al (2001) *Civil Liberties: The Human Rights Act Era*. London, 281.

Judicial support for the right of privacy is not just confined to cases of invasion by the press. Not only has privacy as a right gained support in private law, but also in public law. In relation to this, the courts recognise privacy as a right to be protected in cases involving surveillance, trespass and telephone tapping. In the case of *Marcel v Commissioner of Police Metropolis*⁵⁹⁴ the court held that the seizure of documents by the police constituted infringement of an individual's fundamental rights in his property and privacy. The judge in *Malone v Commissioner of Police* gives similar support⁵⁹⁵ where a private telephone conversation of a suspect in a criminal matter was obtained by telephone tapping. Megarry V.C. observed that despite the absence of authority recognising a particular right of privacy, he would on the grounds of justice and common sense be prepared to hold there was such a right of privacy.

4.3 PRIVACY UNDER THE HUMAN RIGHTS ACT 1998

There have been six private members' bills on privacy since 1961 and at least eight major reports since the Younger Committee. The most recent report on privacy and media intrusion was by the Culture, Media and Sport Select Committee under the chairmanship of Gerald Kaufman MP.

Although the movement for civil right to privacy has gained momentum,⁵⁹⁶ privacy as a legal right is still an elusive one. Though recognitions of privacy, judicial or extra-judicial, are abundance, the commitment to create the right is unconvincing.⁵⁹⁷ While a certain aporia may have manifested itself up to late 1990s, a more spirited response to the problem of invasion of privacy thereafter should have been expected. But resolution to the problem may be premature even with the introduction of the Human Rights Act 1998. Nonetheless, the Act covers privacy as a right that merits protection in the UK. The Act also paves the way for casuistic approach in resolving the issue of invasion of privacy.

⁵⁹⁴ [1992] Ch 224.

⁵⁹⁵ [1979] Ch 344.

⁵⁹⁶ Recently, an organization called Liberty has conducted a research on privacy at national level to review the state of privacy in the United Kingdom. See <http://www.liberty-human-rights.org.uk>

⁵⁹⁷ The government has refused to legislate right of privacy after the report by Sir David Calcutt. Recently, the Culture Secretary has made it clear that the government is not in favour of privacy law. See <http://www.parliament>

4.3.1 INCORPORATION AND MAIN FEATURES OF THE HUMAN RIGHTS ACT 1998

The introduction of the Human Rights Act 1998 has a significant impact on the development of right of privacy. It has accelerated the development through the incorporation of the European Convention on Human Rights.⁵⁹⁸ The preamble of the Act declares that it is 'An Act to give further effect to rights and freedom guaranteed under the European Convention...' This indicates that the government is obliged to exercise and implement the rights enunciated in the Convention.

Section 1 (2) clearly incorporates the rights and freedom of the European Convention on Human Rights. It provides that Articles 2 to 12 and 14 of the Convention relating to freedoms and fundamental rights to have effect for the purpose of the Human Rights Act 1998. This does not mean that the courts are bound to follow the jurisprudence of the European Court of Human Rights. The courts have only a duty to take account of the rights as provided by section 2 (1) of the Act. However, reference to the rights is pertinent in fashioning a domestic law on privacy. The right must be in accordance with the domestic legal system in ways that are appropriate to the UK context. In this regard, Lord Irvine, during the debate on the Human Rights Bill, said that:

...it will be a better law if the judges develop it after incorporation because they will have regard to Articles 8 and 10...I believe that the true view is that the courts will be able to adapt and develop the common law by relying on existing domestic principles...to fashion a common law right to privacy.⁵⁹⁹

With regard to this, there are four main features of the Human Rights Act 1998 that are relevant in stimulating the development of privacy law in the UK. Firstly, section 2 of the Act imposes an obligation on the court or tribunal to take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights in determining a question that has arisen in connection with a Convention right.

⁵⁹⁸ See Lord Philips MR in *H (A Healthcare Worker) v Associated Newspapers Limited* [2001] EWCA Civ 2081, para 40.

⁵⁹⁹ HL. Deb. 583, c. 704. See also HC. Research Paper 98/25. The Human Rights Bill [HL] Bill 119 of 1997-98: Privacy and the press, 11. <http://www.parliament.uk/commons/lib/research/rp98/rp98-025.pdf>

Secondly, section 3 provides that the provisions of domestic legislations must be compatible with the Convention rights only to the extent it is possible to do so. However, it will not affect the validity of legislations that are incompatible with Convention rights.⁶⁰⁰ As far as section 2 and 3 are concerned, the judgment, decision or declaration made by the European Court of Human Rights have no effect in revoking or abrogating domestic law. Even in case of an incompatibility being declared, the legality of primary and secondary legislations will not change.⁶⁰¹ If a person cannot find a remedy under the domestic law then he can seek redress from the European Court of Human Rights.

Thirdly, section 6 makes it unlawful for public authorities to act in a manner that is incompatible with the Convention Rights. According to section 6 (3), public authority includes a court or tribunal. The effect of this provision is that the courts in deciding cases must do so in a way that is compatible with the Convention. As such the courts are duty bound to act consistently with the Convention rights.

There is an uncertainty regarding the meaning of public authority. An expansive meaning by assessing the role and objective of a body would include the relevant bodies other than courts and tribunals. In this regard, Singh argues that a corporation such as BBC whose functions are of public nature is likely to be considered as public authority. So is the Press Complaints Commission, a body created not by statute but nevertheless exercising some public functions.⁶⁰² The key criteria in ascertaining a body as a public authority under the Human Rights Act 1998 is the functional aspect as provided by section 6 (3) (b) ‘any person certain of whose functions are functions of a public nature...’

Fourthly, section 12 in general stresses the importance of freedom of expression. The inclusion of section 12 was the result of a persistent lobby by the press. It provides that a court must have particular regards to the importance of the right to freedom of expression in actions against the media. Section 12 (1) reads:

⁶⁰⁰ See section 3 (2) (b) and (c) of the Human Rights Act 1998.

⁶⁰¹ Whitty, N. et al (2001) *Civil Liberties Law: The Human Rights Act Era*. London, 22.

⁶⁰² Singh, R. Privacy and the Media after the Human Rights Act. (1998) 6 *EHRLR* 712, 717.

This section applies if a court is considering whether to grant any relief that, if granted, might affect the exercise of the Convention right to freedom of expression.

It also provides that the courts have a duty to give particular regards to any relevant privacy code in making its decision involving materials of journalistic, literary or artistic. In general, section 12 provides accommodation for competing interests. It makes freedom of expression as the most valued right especially when it clashes with a right of privacy. As observed by Robertson that 'the original point of section 12 was to give the media a special privilege so it could ward off privacy claims and injunctions.'⁶⁰³ Arguably, the effect of section 12 is to give emphasis to freedom of expression.

The emphasis on one right over the other is inconsistent with the ECHR. The right of privacy and freedom of expression in Article 8 and 10 of the ECHR, respectively, are regarded as fundamental rights. Each article is qualified in a way that allows the interests under the other article to be taken into account. The ECHR does not create a distinction between both free speech and privacy, in term of priority. Both rights are to be regarded as an exemption to each other. In this context, Phillipson argues that Article 8 should be read in the light of Article 10 and *vice versa* without giving priority to any particular right.⁶⁰⁴ Since the ECHR is constituted on a right-based principle, it could arguably be said that freedom of expression and privacy are equally important and fundamental. The ECtHR uses a proper and fair balance under the doctrine of proportionality to accommodate the clash between both rights. In the British context, the accommodation exercise is carried out based on balancing approach. Arguably, this is unsatisfactory because privacy issues are addressed using the framework of confidentiality instead of a proper privacy-orientated approach.⁶⁰⁵ Thus, it is unclear as to what extent the right to privacy should overshadow the right to freedom of expression.

Notwithstanding the provision of section 12 (4), which emphasises freedom of expression, the importance of free speech does not always override the right of privacy.

⁶⁰³ Robertson, N. and Nicol, A. (2002) *Media Law*. London, 63.

⁶⁰⁴ Phillipson, G. Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act. (2003) 66 *MLR* 27.

⁶⁰⁵ Markesinis, B. et al. Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help). (2004) 52 *Am. J. Comp. L.* 133, 153.

Brooke J in *Douglas v Hello! Ltd*⁶⁰⁶ said that ‘Although the right to freedom of expression is not in every case the ace of trumps, it is a powerful card to which the courts of this country must always pay appropriate respect.’ This is so when section 12 (4) (b) requires the courts to have particular regard not only to freedom of expression but also to any relevant privacy code. The effect of this provision is to recognise the approach of self-regulation in dealing with invasion of privacy by the media. In relation to the press, the Press Complaints Commission Code of Practice recognises right of privacy. Rule 3 of that Code reads:

Privacy

- i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications. Editors will be expected to justify intrusions into any individual's private life without consent.
- ii) It is unacceptable to photograph individuals in private places without their consent.

Note - Private places are public or private property where there is a reasonable expectation of privacy.

Previously, Rule 3 (ii) of the Code specifically mentioned the prohibition to take photographs of people with long-lens in public or private places where there is a reasonable expectation of privacy. However, the new Code of Practice, which took effect from 1st June 2004, generalises the taking of photograph.⁶⁰⁷ It could arguably be said that the taking of photographs conventionally or surreptitiously is unacceptable if that would invade the privacy of others.

4.3.2 THE IMPACT OF THE HUMAN RIGHTS ACT 1998

Although the Act does not create new substantive rights, it may inspire the creation of a new private law right to privacy by making the Convention rights more relevant.⁶⁰⁸

⁶⁰⁶ [2001] QB 967, 982.

⁶⁰⁷ The Press Complaints Commission, Code of Practice. <http://www.pcc.org.uk/cop/cop.asp>

⁶⁰⁸ See *Barrett v London Borough of Enfield* [1999] 3 WLR 79, 85. Lord Bingham agreed to the Convention rights as having the legal binding effect under the Human Rights Act 1998. See *R v DPP, ex parte Kebilene* [1999] 3 WLR 175.

Clearly, the Act serves as a platform for the courts to exercise their judicial activism especially in developing a right of privacy. In this context, Grosz et al argues that the Convention rights are part of a domestic law for all practical purposes. They based their reason on section 6, which makes it unlawful for a public authority to act in a way that is incompatible with a Convention right. A public authority in exercising a discretionary power must respect Convention rights and its principles. In addition, section 7 allows a victim of a breach to take legal action against the authority and seeks remedies including damages as provided by section 8.⁶⁰⁹ On the other hand, Sedley LJ reasoned that by virtue of section 2 and section 6 of the Act, the courts must not only take into account jurisprudence of both the Commission and the European Court of Human Rights which points to a positive institutional obligation to respect privacy; but they also must act compatibly with the Convention rights. On this basis, it could arguably be said that section 2 and section 6 give the final impetus to the recognition of a right of privacy in English law.⁶¹⁰

4.3.3 PRIVACY UNDER THE EXISTING LEGAL FRAMEWORK

The law as it stands today is that there is no freestanding law of privacy.⁶¹¹ But there are piecemeal protections under the common law principles. The courts are still cautious in exercising its judicial power. The courts are more inclined to adopt less controversial approach by extending the existing legal principles in breach of confidence.

The positive attitude of the courts is translated by the readiness to recognise privacy as a legal right using pre-existing legal framework. In the case of *Douglas v Hello! Ltd*,⁶¹² the claimants entered into an exclusive arrangement with OK! Ltd whereby the magazine would have the sole rights to take and publish photographs of their wedding. The claimants exercised strict security whereby all persons providing services entered into confidentiality agreements, and guests were requested not to take photographs or videos. A rival magazine Hello! Ltd managed to get pictures from an intruder who took

⁶⁰⁹ Grosz, S. et al (2000) *Human Rights: The 1998 Act and the European Convention*. London, 9.

⁶¹⁰ *Douglas v Hello! Ltd* [2001] QB 967, 998.

⁶¹¹ *Wainwright v Home Office* [2002] QB 1334.

⁶¹² [2001] QB 967.

photographs of the wedding and proposed to publish them. The court granted the application for interim injunction to restrain publication. The Court of Appeal held that a breach of confidence claim was arguable. However, on the assumption that the photographer might have been an intruder, there was a difficulty in establishing the relationship of confidentiality. The court concluded that an injunction was not appropriate since the claimants had sold a substantial part of their privacy right and turned it into a commercial commodity. Sedley LJ said:

...we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy.⁶¹³

This is a clear departure from Glidewell LJ in *Kaye v Robertson* when he said there is no right of privacy in English law.⁶¹⁴ Perhaps the opinion by Sedley LJ is an indication of the change towards right of privacy. Though it is an *obiter dictum*, it nevertheless illustrates a new direction, which the courts are prepared to move into. This change has a lot to do with the application of equitable principle of confidentiality by the courts. Such a development has given the courts confidence to be more assertive in favouring a right of privacy. The main difference between Douglas case and Kaye in relation to recognition of right of privacy is that in Douglas, the action was based on breach of confidence. If there is a right of privacy in English law it has grown out of the law of confidentiality.

Sedley LJ's recognition of a right of privacy has gained limited support in *Venables v News Group Newspapers Ltd.*⁶¹⁵ In this case an injunction was granted to preserve the privacy or confidentiality of the whereabouts of two convicted murderers on the basis that the disclosure of their new identities would put them in imminent danger involving the real and strong possibility of serious physical harm and death.⁶¹⁶ It would appear that

⁶¹³ Ibid, 997.

⁶¹⁴ Nevertheless all the members of the court were of the view that there should be a right of privacy in English law. See [1991] FSR 62, Glidewell LJ at p 66, Bingham LJ at p 70 and Leggatt LJ at p 71.

⁶¹⁵ [2001] Fam 430.

⁶¹⁶ Similar case was decided in *X (A Woman Formerly Known As Mary Bell) & Anor v O'Brien & Ors* [2003] EWHC 1101.

the protection of privacy in this case has prevailed. The consequences of revealing private information have superseded the public interest in the information.

Judicial readiness to entertain the idea of a new cause of action exists even in case where there is a commercial interest in controlling publicity by private individual. For instance, in *Attard v Greater Manchester Newspapers Ltd*⁶¹⁷ the Family Division considered the right to privacy of Gracie Attard, the survivor of conjoined twins, and had granted an injunction preventing any publication of pictures of the twins. The parents later decided to sell exclusive photographs of Gracie to other newspapers. They successfully applied to the court to have the order varied to allow publication. The Manchester Evening News published photographs of Gracie taken with a long-lens camera without the consent of the parents. Application by the parents to ban further publication of the photographs by the Manchester Evening News was granted. Bennett J in refusing the application to have the restriction removed held that Gracie had a right to privacy, which could be sold as she wished.

The positive attitude of the court in the Douglas's case was momentarily disrupted by the decision of *Wainwright v Home Office*.⁶¹⁸ In this case, both Mrs. Wainwright and her son were strip searched for drugs on a prison visit. No drugs were found. The search was not conducted according to prison rules. As a result of the search, the claimants claimed that they were humiliated and distressed. The judge awarded them aggravated damages for infringement of their privacy right. On appeal, the Home office was successful on the privacy issue. Mummery LJ ruled that there was no tort of invasion of privacy. He stated that:

As to the future I foresee serious definitional difficulties and conceptual problems in the judicial development of a 'blockbuster' tort vaguely embracing such a potentially wide range of situations. I am not even sure that anybody- the public, Parliament, the press- really wants the creation of a new tort, which could give rise to as many problems as it sought to solve.⁶¹⁹

⁶¹⁷ Unreported case [2001] Fam. Div. The case is cited in Tugendhat, M. and Christie, I. (2002) *Law of Privacy and Media*. Oxford, 112.

⁶¹⁸ [2002] 3 WLR 405.

⁶¹⁹ Ibid, 419.

Mummery LJ's disapproval of the creation of right of privacy is an unfortunate moment in the development of privacy in the UK. This is rather a bemusing approach particularly when English law strongly protects personal reputation under defamation law, yet unwilling to protect dignity, a value cherished under liberal philosophy, which underlines the right to privacy. The case occurred before the Human Rights Act 1998 came into force. The Court of Appeal decided that there was no right of privacy at common law before the Human Rights Act 1998. The Act could not be relied on to change a substantive law by introducing a retrospective right to privacy.

Invasion of privacy by the press relates to the method of gathering information and the publication of confidential information.⁶²⁰ So far the courts find that the existing cause of action manages to deal with privacy-related issue. Issues on privacy involving photographs and private information have been decided adequately covered by breach of confidence. The House of Lords in *Campbell v MGN Ltd*⁶²¹ by majority decisions (Lord Nicholls and Lord Hoffmann dissenting) ruled that the publication of photographs taken surreptitiously outside the place where the appellant had been receiving therapy for drug addiction was sufficient to outweigh the defendants' right to freedom of expression. Lord Hope found that the respondent's decision to publish the photographs suggests that a greater weight was given to the wish to publish a story that would attract interest, rather than to the wish to maintain its credibility. The court disagreed with the finding that it was peripheral to the published text. The photographs revealed where the treatment was taking place and the text went into the frequency of her treatment. In this way not only did the press intrude into what had been some of the characteristics of the medical treatment, but it also tended to deter her from continuing the treatment, which was in her interest. In fact it also inhibited other persons attending the course from staying in, as they might be concerned that their participation might become public knowledge. The court also held that there was an infringement of the appellant's right to privacy that cannot be justified.

⁶²⁰ Laws, J. The Limitations of Human Rights. (1998) *PL* 254, 263.

⁶²¹ [2004] UKHL 22.

In addition, the court in *A v B plc*⁶²² had to decide on confidential information involving a public figure. The claimant, a married professional footballer, had affairs with two women. He applied for an injunction to protect his privacy. Jack J held that the claimant was likely to succeed in his claim for privacy at trial and granted an injunction to restrain publication of the affairs by a national newspaper. However, the injunction was discharged by the Court of Appeal, *inter alia*, the degree of confidentiality to which the footballer was entitled to was very modest. The court gave less weight to confidentiality of sexual relationship outside marriage. The court said that 'the stable the relationship the greater would be the significance which was attached to it.' The weight of confidentiality becomes less for a person who courted publicity. Although in this case the footballer had not courted publicity, he was inevitably a figure of whom the public and the media would be interested in.

In most cases invasion of privacy by the press is predominantly concerned with disclosure of private information. The classification of information that amounts to confidential personal information that merit protection limits the scope of privacy. In *Theakston v MGN Ltd*⁶²³ the essence of information that the plaintiff was seeking to protect from disclosure did not constitute confidential information that was worthy of protection. The court decided to grant an injunction to restrain publication of photographs but refused an injunction to restrain publication of the story. The court held that a brothel is not a private place because it was likely that other customers and staff would see who came and went. The court also took into account the claimant's previous publicity encounters which he never complaint. The fact that he had placed aspects of his private life into public domain enhanced his fame, reputation and popularity. He then could not complain if the publicity given to his sexual activities were less favourable. In this case there were two types of information considered by the court. First, was the information relating to the sexual activities engaged in a brothel. The court found that the confidentiality or privacy case in relation to the details of sexual activity was not strong enough to warrant the degree of restriction involved. Second was in relation to the photographs taken inside the place. It is interesting to note that the court held the

⁶²² [2002] 3 WLR 542.

⁶²³ [2002] EWHC 137.

photographs of the claimant taken inside the brothel and published by the newspapers constitute an intrusion into his private and personal life.⁶²⁴ Ouseley J said:

I considered that the right to freedom of expression by publication of such photographs was outweighed by the peculiar degree of intrusion into the integrity of the claimant's personality...⁶²⁵

The decision evinced that the court recognized the publication of photographs as an intrusive act. That alone could amount to a breach of privacy even without disclosure of private facts. Both cases indicate that a claimant who willingly exposes to the media certain aspects of his private life would limit his claim to privacy relating to such future revelations.

The current position in the UK is that a right of privacy is recognised yet the law of confidence provides the protection. The publication of personal information, which amount to an invasion of privacy, is dealt with through the application of the law of confidence. The extension of the law on confidence makes it the most appropriate area to accommodate a privacy issue. As stated by Lord Woolf:

In the great majority of situations, where the protection of privacy is justified, relating to events after the Human Rights Act came into force, an action for breach of confidence now will, where this is appropriate, provide the necessary protection.⁶²⁶

It is unclear whether the courts will still firmly rely on the no freestanding law of privacy when the courts have to decide a case where neither the law of confidence nor any other domestic law offers adequate protection. The inadequacy of English law is demonstrated by the European court decision in *Peck v UK*⁶²⁷ involving the would-be suicide that was filmed in the street holding a knife. The effect of this case may be less profound on the protection of privacy in the UK. It is rather unfortunate that the case of *Martin v UK*⁶²⁸ was struck out of the list when the final resolution of the case was constituted with the

⁶²⁴ In *Douglas v Hello! Ltd.* [2001] QB 967, the court said that unauthorised photographs can be regarded as information for the purposes of the law of confidence.

⁶²⁵ Op. cit., n. 626, para 79.

⁶²⁶ *A v B plc* [2002] All ER 545.

⁶²⁷ (2003) 36 EHHR 41.

⁶²⁸ Application no. 63608/00. European Court of Human Rights Portal <http://cmiskp.echr.coe.int/tkp197/portal>.

offer of the government to pay for damages and legal cost. This case would enlighten the status of privacy law in the UK because it involved the issue of invasion of privacy. On this premise, Lindsay J said that ‘That inadequacy will have to be made good and if Parliament does not step in then the courts will be obliged to...’⁶²⁹ This then leads to the next point of discussion on the proper development of privacy law.

4.3.4 AN INCREMENTAL APPROACH OR STATUTORY LAW ON PRIVACY?

The debate on freestanding law of privacy is still in progress. If the UK were to have a privacy law, one of the key questions is should it be created by Parliament or through incremental development of common law principles pronounced by the courts. Perhaps the remark by Lindsay LJ represents the reserved stand of the judiciary in leaving the matter to Parliament.⁶³⁰

Efforts to introduce legislation on law of privacy can be traced back since Lord Mancroft’s bill in 1961. The bill and several others afterward failed to garner support especially from the government. The Review of Press Self-Regulation in 1993 and the National Heritage Committee on Privacy and Media Intrusion have recommended legislation to protect privacy. The government in responding to the recommendation of the latter rejected the idea of having a new law of privacy. The decision not to create law of privacy can be attributed to some constraints encountered by the government.

The major constraint is the strong opposition from the press. This has to a certain extent influence the decision against the new law. Such a powerful influence is self-evident when the government accepted the inclusion of section 12 into the Human Rights Act 1998. On the other hand, the government also needs to protect its own political agenda in deciding not to implement the proposals to legislate against invasions of privacy. The government is fully aware of the harm that the press can cause especially in term of political popularity.⁶³¹ The formulation of the law is not entirely dictated by the

⁶²⁹ *Douglas v Hello!* [2003] 3 All ER 996.

⁶³⁰ See also per Megarry VC in *Malone v Metropolitan Police Comr* [1979] Ch 344, 372.

⁶³¹ The pressure by the press in publishing personal information can force ministers to resign. For instance, David Mellor forced to resign over sex scandal exposed by the press. Steven Byers was under pressure and later resigned when the press highlighted the insensitive attitude of his staff.

government but also by the voice of majority through the representative system. Democratic process by way of consultation is the first step in acquiring responses from the public and interested parties.⁶³² Though statutory protection is desirable, it is difficult to cover every aspect of privacy with sufficiently precise terms.⁶³³

However, beside the negative reaction from the government and the opposition by the press, statutory law on privacy is still considered appropriate. The analysis by Hartmann, which concluded that a statutory right of privacy is about to emerge in England based on the impetus provided by recommendations from the Select Committee, the Calcutt's proposals and the Law Commission Consultation Paper is untenable.⁶³⁴ At the time this study is conducted, the response from the government on the matter remains the same.⁶³⁵ The position is made strong recently by Tessa Jowell, the Culture Secretary, when she made it clear that the government had no plans to introduce law on privacy.⁶³⁶ In this regards, Lord Woolf CJ in his speech during the opening of the judicial year of the European Court of Human Rights said that the British courts have developed a parallel doctrine to the margin of appreciation.⁶³⁷ The doctrine is to deal with the relations between the domestic courts, Parliament and the executive. This so called doctrine of deference or respect requires the United Kingdom courts to recognise that there are situations where Parliament and the executive rather than the courts are in a better position to make difficult choices between competing interests.

The negative response by the government on privacy law raises a doubt as to the government's commitment in upholding the human rights principles. In this regard, it

⁶³² Legislation is preferable because the law would carry the imprimatur of democratic approval. See Bingham, T. Should there be a Law to Protect Rights of Personal Privacy. (1996) 5 *EHRLR* 455, 462.

⁶³³ Eady, D. A Statutory Right To Privacy. (1996) 3 *EHRLR* 243, 245. Eady argues that the objectives underlying Article 8 of the European Convention of Human Rights can be the basis in overcoming the definitional difficulty.

⁶³⁴ Even a series of incidents involving the private lives of the royal family and government ministers in 1992 and 1993 cannot give a forceful impact to persuade the government to enact statutory law of privacy. See Hartmann, C. The Emergence of Statutory Right to Privacy. (1995) 16 *J.L.M. & P.* 15.

⁶³⁵ The latest development is the recommendation by the Culture, Media and Sports Committee that the government should introduce privacy legislation.

⁶³⁶ Evidence given by Tessa Jowell before the Select Committee on Culture, Media and Sport, Tuesday 1 April 2003. see <http://www.parliament.the-stationary-office.co.uk>

⁶³⁷ Lord Woolf CJ (2003) *Solemn Hearing of the European Court of Human Rights*. <http://www.echr.coe.int/eng/Speeches/Speechby.htm>

shows that there are freedoms in the UK but not the rights.⁶³⁸ In the absence of legislation on privacy, judicial activism could fill the gap in English law. It is against this background of freedom-based law that the law of confidentiality has been developed. The Lord Chancellor in his response to the amendments to Human Rights Bill said that the judges are free to develop the common law in their own independent judicial sphere. In relation to the law of privacy, it will be a better law if the judges develop it after the incorporation because they will have regard to Articles 8 and 10. The Lord Chancellor also opined that the courts would be able to adapt and develop a common law by relying on the existing principles to fashion the common law right to privacy.⁶³⁹ Lindsay J shares this when he said that if Parliament does not act soon, the thrust would be upon the judiciary to create the law bit by bit.⁶⁴⁰ The platform for the court to do so is provided by section 6 of the Human Rights Act 1998. The provision imposes an obligation on the courts as a public authority to act compatibly with the Convention rights, which include right of privacy under Article 8.

The creation of privacy law by way of incremental development ensures protection on case-by-case basis. Judges who are trained within the system have the capabilities to deal with issues of invasion of privacy.⁶⁴¹ The courts are responsive to the changes in society by developing common law principles. Moreover, the elasticity of the common law principles enables the courts to adapt it to the varying conditions of society.⁶⁴² In this context, Keene LJ said:

Breach of confidence is a developing area of the law, the boundaries of which is not immutable but may change to reflect changes in society, technology and business practice.⁶⁴³

⁶³⁸ English law has been historically based on freedoms not right. Per Brooke LJ in *Douglas v Hello! Ltd* [2001] QB 967, 985. See also per Lord Goff in *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109, 283.

⁶³⁹ See Hansard, H.L. Deb. 24 November 1997, cols 784-785.

⁶⁴⁰ See *Douglas v Hello!* [2003] EWHC para 229. See also Wacks, R. (1995). *Privacy and Press Freedom*. London, 173.

⁶⁴¹ The new law of privacy is not totally strange to the judges because they have been applying common law principles such as breach of confidence, trespass, defamation and harassment which cover privacy related interest.

⁶⁴² *Wason v Walter* (1868) LR 4 QB 73, 93. See also *Invercargill v Hamlin* [1996] AC 624.

⁶⁴³ *Douglas v. Hello! Ltd* [2001] Q.B. 967, 1011-2.

Dolding and Mullender define incrementalism in the context of negligence law as ‘a form adjudication involving the articulation of liability rules which are, at once, new...and yet are conditioned by pre-existing law...’⁶⁴⁴ There are two main ingredients for incrementalism according to the definition. First, the law or rules must be new. Second, pre-existing law must ‘conditioned’ the new one in order to develop. They argued that a protection of significant interests is the main purpose in employing tort law. Protection can only be given if it involves a wrongful transaction where one party is harm. The approach of incrementalism according to this view is appropriate in case of a new law being developed within the framework of a pre-existing law.⁶⁴⁵ However, there is a set back if the scope of the new law is wider than the pre-existing law. The real potential of a new law being developed would be affected because of the confinement.⁶⁴⁶

Incremental development of privacy as a new law has already taken place through the willingness of the courts to address invasion of privacy under the breach of confidence.⁶⁴⁷ The courts have incrementally developed the extension of the law of confidence. The original concept of confidence applicable to a limited area of commercial and employment relationship were developed to cover personal and private information. This process will eventually build up a body of case law over time that could provide guidance in dealing with issues before the courts.⁶⁴⁸ The incorporation of privacy into the law of confidence means that the right of privacy develops accordingly.

The incorporation of privacy into breach of confidence has a positive and a negative effect. The positive effect is that the courts can now accord legal protection of privacy. The negative effect is in relation to the distinction between privacy and breach of confidence. Privacy is wider in the sense that it does not only protect personal information but also ‘those who simply find themselves subject to an unwanted intrusion

⁶⁴⁴ Dolding, L. and Mullender, R. Tort Law, Incrementalism, and the House of Lords. (1996) *NILQ* 47, 13.

⁶⁴⁵ See Lord Chancellor’s response to the amendment of Human Rights Bill by Lord Wakeham in Hansard, H.L. Deb, November 24, 1997, cols 784-784.

⁶⁴⁶ Young, A.L. Remedial and Substantive horizontality: The Common Law and *Douglas v Hello! Ltd.* (2002) *PL*, 241.

⁶⁴⁷ See Lord Goff in *AG v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281. Laws J. in *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, 807. Lord Woolf in *A v B plc* [2002] All ER 545, para. 11. Lindsay J. in *Douglas v Hello! Ltd* [2003] EWHC para 229.

⁶⁴⁸ See Younger, K. (1972) *Report of the Committee on Privacy*. Cmnd. 5012, 11 para 40.

into their personal lives.’⁶⁴⁹ An individual's privacy can also be invaded in ways not involving publication of information such as strip searches. A proper growth and development of privacy is restricted when it is confined within the framework of breach of confidence.⁶⁵⁰

On the other hand, the creation of privacy law by the courts may lead to inconsistency. Inconsistency occurs when judges make decisions on a case-by-case basis. Illustration to this situation can be found in the articulation of the meaning of public interest by the courts. Lord Woolf in *A v B plc*⁶⁵¹ widened the scope of public interest when he took into account the interest of newspapers as part of the concept. Previously, in the case of *Grobbelaar v News Group Newspapers*,⁶⁵² the Court of Appeal rejected a public interest defence in part because the articles in question were designed to serve the newspaper's private commercial interest rather than public interest. In addition, the court of Appeal in *Lion Laboratories v Evan and Express Newspapers*⁶⁵³ made the distinction between matters that were in the public interest and those that were merely interesting to the public. The court cautioned the press for confusing the public interest with its own interest to increase sales.

It would be hard to suppress the pressure for introducing the law of privacy assessing from the willingness of the courts in expressing judicial recognitions on right of privacy and the lackluster response from the government. It might be harder when the need to give redress for invasion of privacy is obvious and pressing.⁶⁵⁴

The opposition of having the law mainly relies on the indeterminacy of definition and the scope of privacy.⁶⁵⁵ Nevertheless, Lord Bingham is positive on the prospect of privacy when he said ‘The problems of defining and limiting a tort of privacy are formidable but the present case strengthens my hope that the review now in progress may prove

⁶⁴⁹ See per Sedley LJ in *Douglas, Zeta-Jones v Hello! Ltd* [2001] 2 WLR 992, 126.

⁶⁵⁰ Sing, R. and Strachan, J. The Right to Privacy in English Law. (2002) *EHRLR* 2, 126.

⁶⁵¹ [2002] EWCA Civ 337.

⁶⁵² [2001] 2 All ER 437.

⁶⁵³ [1985] QB 526.

⁶⁵⁴ Bingham, T. Should There be a Law to Protect Rights of Personal Privacy. (1996) 5 *EHRLR* 455, 462.

⁶⁵⁵ Younger, K. (1972) *Report of the Committee on Privacy*. Cmnd. 5012.

fruitful.’⁶⁵⁶ Another reason for opposing the privacy law, which is a lame justification, is that the protection accorded by the law will only benefit certain groups of people in the society especially those who can afford legal cost.⁶⁵⁷ Ordinary and less affordable people will think twice before suing others for invading their privacy due to financial reason.⁶⁵⁸ Naturally, the outcome of legal action is not always ascertainable. On a cost and benefit analysis, the fear of losing the case and the expensive legal cost would probably make them choose to sacrifice their right of privacy even though it is distressful and humiliating. In addition, lack of legal service scheme would deter ordinary people from seeking legal redress in case of invasion of their privacy.

On the other hand, incremental development of privacy can also take place through a common law principle of willful infliction of harm as developed by the court in *Wilkinson v Downton*.⁶⁵⁹ The House of Lord considered this case in *Wainwright v Home Secretary*.⁶⁶⁰ Lord Hoffman rejected the application of *Downton* case because ‘It does not provide a remedy for distress which does not amount to recognized psychiatric injury...’⁶⁶¹

However, if someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation. Protection for undue invasion of privacy could be given on the ground of severe mental distress.⁶⁶² This argument is based on the common law recognition of nervous or mental shock in cases of negligence. In case of invasion of privacy, publication of private information by the press may be interpreted as a manifestation of intention to cause psychiatric harm. Perhaps with the limited scope of breach of confidence, the courts can gradually extend the application of the principle as a potential area to accommodate the right of privacy.

⁶⁵⁶ *Kaye v Robertson* [1991] FSR 62, 70.

⁶⁵⁷ Byrne, Privacy laws only protect the rich, editors insist. *The Guardian*, June 17 2003.

<http://media.guardian.co.uk/medialaw/story>

⁶⁵⁸ In the United Kingdom, legal aids are not extended to defamation cases. The aid also is not applicable for privacy cases.

⁶⁵⁹ [1897] 2 QB 57.

⁶⁶⁰ [2003] UKHL 53.

⁶⁶¹ Ibid:para 47. See *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721.

⁶⁶² Neill, B. The Protection of Privacy. (1962) 25 *MLR* 393.

Is English law moving towards greater protection of privacy? Basically there are three views on privacy in the UK. First, there should be no law of privacy.⁶⁶³ According to this view, privacy will have a chilling effect on freedom of expression. It maintains that freedom of expression is more important in a democratic society that revered open discussion and debate. The press subscribes to this view and to a certain extent this is also the view of the government. The second view is that, there should be a distinct law to protect the right of privacy. This is on the basis that privacy is as equally important as other rights such as freedom of expression under the Convention. Nevertheless, it is recognised that there are legitimate circumstances that can restrict the right. Third, privacy should be protected within the existing framework of law of confidence. According to this view, law of confidence could accommodate privacy as both areas involve disclosure of information without consent. Interestingly, the second and third views have gained support from the courts.⁶⁶⁴

4.4 HORIZONTAL EFFECT

The incorporation of right of privacy under Article 8 of the Convention by the Human Rights Act 1998 means that the right of privacy is available in the UK. However, a guarantee of privacy is only available against public authorities, not against private persons. Arguably, a private person cannot invoke the guaranteed right to take action against other private individuals including the press. Section 6 (1) of the Human Rights Act 1998 makes it clear that only public authority has the obligation to act in accordance with the Convention rights. The section provides:

It is unlawful for a public authority to act in a way that is incompatible with a Convention right.

It excludes private individuals from the obligation to observe the Convention rights. At this juncture, it shows that the Act applies vertically in relation to the actions of public bodies. Section 7 (1) strengthened the vertical effect of the Act when it provides for an

⁶⁶³Wacks, R. The Poverty of Privacy. (1980) 96 *LQR* 73.

⁶⁶⁴ See per Lord Woolf in *A v B plc* [2002] EWCA Civ 337, para 11. Per Phillips MR in *H (A Healthcare Worker) v Associated Newspapers Limited* [2002] EWCA Civ 195, para 40. *Campbell v MGN Ltd* [2004] UKHL 22.

action against breach of section 6 (1). A person who brings such an action may rely on the Convention rights only if he is a victim of the unlawful act.⁶⁶⁵ Reliance on the Convention rights can only be made when the public authority has acted inconsistently with the rights. Thus, any legal action for the breach of Convention rights can only be instituted if the transgressor is a public authority.

The application of the Human Rights Act 1998 in case between private individuals is unclear. This area has generated considerable discussions as to whether the Act applies between private litigants.⁶⁶⁶ Section 6 (1) of the Human Rights Act 1998 is used as the basis to support the existence of horizontal effect.⁶⁶⁷ This allows for the application of incorporated rights between private individuals. The inclusion of the courts and tribunals into the meaning of public authority has made horizontal effect as a possible prospect.⁶⁶⁸

Generally, the possible horizontal effect of the Act can be by way of direct⁶⁶⁹ and indirect effect.⁶⁷⁰ According to Wade the Human Rights Act 1998 has a direct horizontal effect.⁶⁷¹ He argued that the provisions of the Act and its spirit imply that the Act does provide protection against violation by private individuals. He relied on section 6 (3) of the Act, which makes the courts under duty not to act in a way incompatible with the Convention rights. Thus, in exercising its judicial functions, the courts have to decide in accordance with the Convention no less in a case between private litigants than in a case against a public authority. He also argued that the incorporation of the Convention rights has made the rights available to private individuals. In this regard, enforcement of the Convention rights against private individuals has taken place in *Venables v News Group Newspapers Ltd*⁶⁷² and the case of *X & Anor v O'Brien & Ors.*⁶⁷³ Although the Convention does not create independent causes of action, the fact that the court is obliged

⁶⁶⁵ Section 7(1) (b) of the Human Rights Act 1998.

⁶⁶⁶ Whitty, N. et al (2001) *Civil Liberties Law: The Human Rights Era*. London, 35-39.

⁶⁶⁷ Horizontal effect refers to application of the Convention rights between private individuals.

⁶⁶⁸ See section 6(3) of the Human Rights Act 1998.

⁶⁶⁹ Wade, W. Horizons of Horizontality. (2000) *LQR* 116, 217.

⁶⁷⁰ Hunt, M. The Horizontal Effect of the Human Rights Act. (1998) *PL* 423, 442. Oliver, D. The Human Rights Act and Public Law/Private Law Divides. (2000) *EHRLR* 4, 343. Phillipson, G. The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper? (1999) *MLR* 62, 824.

⁶⁷¹ Wade, W. Horizons of Horizontality. (2000) *LQR* 116.

⁶⁷² [2001] Fam 430.

⁶⁷³ [2003] 36 EWHC 41.

to act in conformity with the Convention under section 6 means that it must protect the rights of individual where necessary.

On the other hand, Hunt argues that the Human Rights Act 1998 has an indirect horizontal effect.⁶⁷⁴ He said the position before the Act is that human rights were protected by the courts, including cases involving private parties. In order to be consistent with the Convention, the courts have exercised their power and develop a common law. The development of the common law continues even after the Act comes into effect. In addition, certain articles of the Convention impose positive obligations on the state to take positive steps to protect individuals against interference by other private parties. Article 8 has been interpreted by the ECtHR as imposing positive obligations in certain circumstances, including an obligation to protect an individual against violation of the Convention rights by other private parties. He also argued that by including courts and tribunals in the meaning of public authorities has made them duty bound to act compatibly with the Convention. This includes cases involving private disputes governed by the common law.

Buxton however disagrees that the Act creates private law rights that can be asserted by private individual against another.⁶⁷⁵ He argued that the Convention rights are the creation of European Convention on Human Rights that can only be imposed on public bodies. Furthermore the content of those rights does not impose obligations on private citizens.

The positive obligations imposed by the Convention rights on the state require adoption of measures designed to protect the relations of individuals among themselves.⁶⁷⁶ This has created a space where the courts can exercise its judicial innovation to fashion a new law in accordance with the Convention rights. In *Goodwin v United Kingdom*⁶⁷⁷ the Court found that the respondent's state has violated Article 8 when the state failed to exercise positive obligation to review its law pertaining to post-transsexual.

⁶⁷⁴ Hunt, M. The Horizontal Effect of the Human Rights Act. (1998) *PL* 423, 437.

⁶⁷⁵ Buxton, R. The Human Rights Act and Private Law. (2000) 116 *LQR* 48, 55-6.

⁶⁷⁶ See *X and Y v The Netherlands* (1985) 8 EHRR 235, 239-240.

⁶⁷⁷ (2002) 35 EHRR 447.

The Joint Committee on Human Rights in its report noted that it is increasingly accepted that the Act will have some measure of "horizontal" effect on the relationships between private citizens, mostly arising from the duty of courts and tribunals themselves to act in compliance with Convention rights.⁶⁷⁸ The main facet of the Human Rights Act 1998 is to incorporate the Convention rights as proclaimed by the government in its white paper 'Rights Brought Home'⁶⁷⁹. As such the rights should be fully embraced as perceived by the Convention.

With respect to this, the lack of commitment by the government will only make the incorporation of the Convention rights as another political rhetoric. The European Convention on Human Rights clearly stated that everyone in the jurisdiction of the contracting states should enjoy rights and freedoms as defined in Section 1 of the Convention. Article 8 of the Convention confers the right to respect for private life and family life to everyone, which include private individuals. Ironically, in this regard, the incorporation of the Convention rights into the Human Rights Act 1998 is not in harmony with the aspiration of the Convention. Therefore, the absence of legal right to privacy in the United Kingdom implies that the acceptance of the Declaration of Human Rights is at least to some extent a sham.⁶⁸⁰

4.5 PRIVACY AND THE PRESS

Privacy is a right that has been slow to develop into law. Perhaps the chilling effect it has on freedom of expression, in particular press freedom, is a factor for such phenomenon. Perennial debate on the introduction of a new law on privacy is stimulated not only by the transgression of public authorities but also by the conduct of the press.⁶⁸¹ The private members' Bill introduced between 1961 and 1989 were the reaction to the invasion of privacy by the press.

⁶⁷⁸ See Sixth Report of Joint Committee on Human Rights.

<http://www.parliament.the-stationary-office.co.uk>

⁶⁷⁹ See <http://www.archive.official-documents.co.uk>

⁶⁸⁰ Ross, D. M. (1972) Minority Report. In Younger, K. (1972). Report of the Committee on Privacy. London. Cmnd. 5012, 213.

⁶⁸¹ The first Royal Commission on the Press has criticised the preoccupation of some newspapers with triviality and sensationalism. The third Royal Commission suggested a need for the press to act according to some ideas of social responsibility and professional training for journalists.

Some complaints about invasion of privacy by the press relate to the techniques used in acquiring information. Others are about the publication of personal information, and many are about both.⁶⁸² The intrusive manner in acquiring information through investigative reporting, the use of paparazzi and constant surveillance are the techniques employed which have the effect of invading privacy. This is acknowledged by other jurisdiction such as the state of California in the USA where the California Privacy Protection Act 1998 provides protection against technological intrusion and trespass.⁶⁸³ In the UK, the Code of Practice of the PCC states in general term where 'it is unacceptable to photograph individuals in private places without their consent.'⁶⁸⁴

The publication of personal information and disclosure of embarrassing private facts by the press were among the reasons for concern that prompted the UK government to set up Royal Commissions. The first Royal Commission on the Press in 1949 recommended the establishment of a voluntary General Council of the press. The second Royal Commission in 1962 proposed changes in the council membership, with a statutory council if nothing was done. The third Royal Commission in 1977 criticised the press and proposed a legal right to privacy and statutory Press Council if self-regulation did not improve. In addition, a Committee on Privacy and Related Matters was appointed with specific terms of reference dealing with the press attitude in relation to individual privacy:

In the light of the recent public concern about intrusions into the private lives of individuals by certain sections of the press, to consider what measures (whether legislative or otherwise) are needed to give further protection to individual privacy from the activities of the press and improve recourse against the press for the individual citizen...⁶⁸⁵

Undoubtedly, the function of the press as the public watchdog is important in a democratic society. The press plays a role as the eyes and ears to the society. They inform

⁶⁸² Michael, J. (1994) *Privacy*. In McCrudden, C. and Chambers (eds.) *Individual Rights and the Law in Britain*. London, 272.

⁶⁸³ Chemerinsky, E. *Balancing the Rights of Privacy and the Press: A Reply to Professor Smolla*. (1999) 67 *Geo. Was. L. Rev.* 1152.

⁶⁸⁴ See, article 3 of the Press Complaints Commission's Code of Practice.

<http://www.pcc.org.uk/cop/cop.asp>

⁶⁸⁵ Calcutt, D. (1990) *Privacy and Related Matters*. Cm. 1102.

the public on matters of public interest. The role and the duty to inform entitle the press to exercise a degree of freedom. Restriction on this freedom will only deprive the public from getting information that helps to form their judgment on matters affecting their interests. An ill-informed society cannot contribute and participate effectively in a democratic government.

However, the press has sometimes crossed the line and abused the freedom. The press use private information as commodity in their publication to attract more readers, thus increase sales.⁶⁸⁶ They invade individual privacy by disclosing private facts, which are personal and embarrassing in the name of public interest.⁶⁸⁷ Some publication of personal information is done for ulterior interest rather than the public interest.⁶⁸⁸ Private facts are sensationalised to serve the interest of the public. A degree of prurient interest is present in the public and indulging in that interest helps sell the newspapers.⁶⁸⁹ Besides that, the media has capitalized the cult of celebrities as commodities in the society where affluence is the normal condition of most people.⁶⁹⁰ Warren and Brandeis expressed their animosity toward the conduct of the press in their seminal writing when they said:

Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers.⁶⁹¹

Although there is a public interest in newsworthiness, it is difficult to maintain the press commercial interest in justifying the publication of personal information. In this regard, Stephenson LJ observed that 'the public are interested in many private matters which are no real concern of theirs and which the public have no pressing need to know.'⁶⁹² In most occasions, the press relies on public interest as their shield in disclosing personal information. Sometimes the invocation of public interest is mixed with the press

⁶⁸⁶ For instance, The Sun, originally the Daily Herald, was reoriented to attract more readership by increasing its entertainment coverage and human interest reporting of show business and celebrities. See Curran, J. and Seaton, J. (1991) *Power Without Responsibility*. London, Routledge, 110.

⁶⁸⁷ This is rampant in tabloid newspapers but not in the case of the main-stream newspapers.

⁶⁸⁸ *Gobbelaar v News Group Newspapers Ltd* [2001] 2 All ER 437.

⁶⁸⁹ Martin Cruddace, What price celebrity? *The Guardian* 18 March 2002.

⁶⁹⁰ Gray, J. *Fame is the Filthy Lucre of a Celebrity economy*. The Sunday Times 27 October 2002.

⁶⁹¹ Warren, S.D and Brandeis, L.D. The Right to Privacy. (1890) 4 *Harv. LR* 193.

⁶⁹² *Lion Laboratories Ltd v Evans* [1985] 2 QB 526, 536.

commercial interest. Sir John Donaldson expresses this in *Francome v Mirror Group Newspapers Ltd*⁶⁹³ when he said that ‘they are peculiarly vulnerable to the error of confusing the public interest with their own interest.’⁶⁹⁴ If the commercial interest of the press were to be recognised as part of the public interest, the press would acquire a privilege, which make it a distinct organisation. In this context, the press like any other organisations should be treated equally under the law.

The ambit of public interest is extended to include information that the public are interested in. This includes information concerning those in the public eye and who have courted publicity in the past. Lord Woolf opined that if the newspapers do not publish information which the public are interested in, then ‘there would be fewer newspapers published, which would not be in the public interest.’⁶⁹⁵ It is unclear whether Lord Woolf considers the commercial interest of the press when he said ‘fewer newspapers published’ or fewer newspapers means that the public has less source of information. But if the former were the real intention then it would widen the concept of public interest. It could be arguably said that a commercial interest of the press is a distinctive interest of the organisation that does not relate to the public at large.

The concept of public interest involves matters that are held to affect a considerable number of people. This is discernable in the definition proposed by Barry when he relates the public interest to ‘those interest which people have in common *qua* members of the public’.⁶⁹⁶ Amos disagrees with the interpretation of public interest by Lord Woolf because such a perspective is at odds with the conclusion of the Court of Appeal. In relation to this case, there was a public interest in the material because the footballer was a role model for young people and it was important that his undesirable and unfortunate example be exposed, not because it will sell newspapers.⁶⁹⁷ However, what the public are interested in should not be equated with information of public interest. The Committee on Privacy and Media Intrusion defined public interest as:

⁶⁹³ [1984] 1 WLR 892.

⁶⁹⁴ *Ibid*, 892.

⁶⁹⁵ *A v B plc* [2003] QB 195.

⁶⁹⁶ Barry, B. (1965) *Political Argument*. London, 190.

⁶⁹⁷ Amos, M. Can We Speak Freely Now? Freedom of Expression under the Human Rights Act. (2002) 6 *EHLR* 750, 757.

Those matters that citizens ought to be interested in: information necessary or helpful to participating in the democratic process, information about crimes and misdemeanors, information important to the ability of society and individuals to safeguard health, wealth and safety and generally to the effect of navigating through the complexities of modern life.

On the other hand, according to the Press Complaints Commission Code of Practice⁶⁹⁸ public interest includes:

- 1- Detecting or exposing crime or a serious misdemeanor.
- 2- Protecting public health and safety.
- 3- Preventing the public from being misled by some statement or action of an individual or organisation.

Apparently, the public are interested in all sorts of information and their interests are varied. People rely on the press for different purposes. Some people use the press for education and information, others for sports and gossip columns, while there are those who have a prurient interest in sexual and adulterous affairs of celebrities. This type of news should be regarded as less important as its contribution for the betterment of society is minimal. The commercial pressure as a result of competition forced the press to make changes in publication. One of the changes, which are common today, is by prescribing the sex-dope. In this regard, Hoggart observes that 'we are a democracy whose working people are exchanging their birthright for a mass of pin-ups.'⁶⁹⁹

4.5.1 PRESS AND PUBLIC FIGURE

In relation to public figures, the third limb of the Press Complaint Commission's public interest is frequently used to justify an act of invasion. It is just and fair to expose the hypocrisies and double standards of public figures in their private lives. Lord Denning in *Woodward v Hutchinson*⁷⁰⁰ concluded that it is in the public interest to disclose the truth in case of public figure to correct the untrue image they fostered.⁷⁰¹ The press argues that the public has the right to be informed of the real facts so that they are not being misled.

⁶⁹⁸ <http://www.pcc.org.uk/cop/cop.asp>

⁶⁹⁹ Hoggart, R. (1957) *The Uses of Literacy*. London, 176-77.

⁷⁰⁰ [1977] 1 WLR 760.

⁷⁰¹ *Ibid*, 764.

On this premise, it is the social obligation of the press to expose political corruptions and wrong doings so that check and balance in the society can be exercised.⁷⁰²

The press and public figures are not on good terms when it comes to private lives. From the press point of view, information on marriage life, extra-marital relationship, adultery and medical conditions are among stories that trigger the interest of the public. In relation to this, according to the Council of Europe 1165 of 1998, public figures are persons holding public office using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, economy, arts, social sphere, sport or in any other domain. Arguably, certain aspect of their private lives can legitimately be disclosed on the ground that they have a role model obligation.⁷⁰³

Thus, the role model of public figures creates moral and social obligations. The obligation has limited the scope of privacy that public figures can enjoy. In *A v B plc*,⁷⁰⁴ Lord Woolf acknowledged that public figures are entitled to private lives. However, because of their public positions, trivial facts can be of great interest and ‘conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure.’⁷⁰⁵ The court in *Campbell v MGN Ltd*⁷⁰⁶ implied that only private facts, which a fair-minded person would consider it offensive to disclose, are within the legitimate concern of the public.⁷⁰⁷ The court observed that it does not mean when a person achieved prominence on the public, ‘his private life can be laid bare by the media.’

Hence, reliance on the role model justification should be restricted in exposing the duplicity of public figures and not for general application. This is affirmed by the court in *Campbell v MGN Ltd* when the court said ‘On principle...where a public figure chooses to make untrue pronouncement about his or her private life, the press will normally be

⁷⁰² The media in general have diverse roles and functions. They are the source of most of our information and understanding about modern world. See Grant, M. (1990) *The Politics of the British Media*. In Jones, B. (ed.) *Political issues in Britain Today*. Manchester, 96.

⁷⁰³ *Theakston v MGN Ltd* [2002] EWHC 137. See also *A v B plc* [2003] QB 195, 208.

⁷⁰⁴ [2003] QB 195.

⁷⁰⁵ *A v B plc* [2003] QB 195, 208.

⁷⁰⁶ [2002] EWCA Civ 1373.

⁷⁰⁷ For instance, private fact of a person being a drug addict when he or she previously denied it.

entitled to put the record straight.’⁷⁰⁸ As such they cannot expect the same treatment by the press as an ordinary person.

However, intimate private facts that are not bound by the obligation are not a legitimate concern of the public. Any disclosure of the facts is an unjust invasion of privacy. Lindsay J. in *Douglas v Hello!* held that the positions of the claimants as public figures have not lessened the right to complain of intrusion. He gave the reason that ‘the steps taken by the Douglasses were not solely for reward or as ‘hype’ but were taken in a genuine and reasonable belief that thereby offensive media frenzy would be avoided.’⁷⁰⁹ In case of politicians, the role model obligation makes certain facts of their private lives susceptible to the public gaze who are also voters. This does not mean that they have to surrender their privacy on the ground of being public figures.⁷¹⁰ Privacy is lost when a person purposely exposed his private facts or directed public attention to him.⁷¹¹

The unjust invasion of privacy by the press does not only confine to public persona or celebrities. The invasion also involves the lives of ordinary individuals, non-publicity seekers, who are being put into the limelight for certain reasons. The unsought publicity may be due to being close relatives of those engulfed in a national tragedy or of those who have committed notorious crimes. Butler-Sloss P. in her decision to grant an injunction to protect the daughter of Mary Bell said ‘She is...entirely innocent and was born into situation over which she has no control.’⁷¹² For this type of individuals, they have no role model obligation that can justify invasion of their privacy. Unlike celebrities, they are not marketing themselves to become famous.⁷¹³ It would be arguable for the press to rely on public interest in exposing their private facts. Therefore, the scope of privacy of ordinary individuals should be wider than public figures and celebrities.

The press objects the law on privacy mainly because it curtails their freedom to publish what public desire. They also argue that the law will hamper investigative reporting,

⁷⁰⁸ [2002] EWCA Civ 1373. See also *Woodward v Hutchinson* [1977] 1 WLR 760.

⁷⁰⁹ [2003] EWHC at 35 para 201.

⁷¹⁰ Professor Barendt’s testimony before the Select Committee of Culture, Media and Sport on Privacy and Media Intrusion. <http://www.parliament.the-stationery-office.co.uk>

⁷¹¹ Seipp, D.J. English Judicial Recognition of a Right to Privacy. (1983) 3 *OJLS* 325, 370.

⁷¹² *X & Anor v O’Brien & Ors* [2003] EWHC 1101, para 49.

⁷¹³ Per Bridge LJ in *Woodward v Hutchins* [1977] 1 WLR 760, 765.

protect only the rich and famous and allow corruption to go unchecked.⁷¹⁴ The objection might be too pre-mature. The press can still enjoy their freedom and carry on with their investigative reporting. But this should not give them a license to transgress by stripping off personal dignity and causes undue distress.⁷¹⁵

Since there is no free-standing law on privacy in the UK to protect personal information as discussed above, it is important then to examine the existing legal principle that could accommodate privacy. Thus, the focus next will be on the suitability of breach of confidence as a framework for protection of privacy.

4.6 BREACH OF CONFIDENCE

The original concept of breach of confidence has developed from a limited area of commercial and employment relationships to personal information. The willingness of the courts to expand the requirement of the quality of confidence and obligation of confidence, enable the courts to adjudge privacy matters. What seems to be a piecemeal and segmented protection of privacy has amalgamated under the law of confidence. Lord Woolf in *A v B plc* stated that the courts could achieve the requirement of acting compatibly with the Convention by absorbing the rights, which Article 8 and 10 protect into the long established action for breach of confidence.

Originally, confidential information is tagged to commercial and trade related information. This type of information is protected from being disclosed because of the prejudicial and detrimental consequences. The court in the case of *Coco v A N Clark (Engineers) Limited*⁷¹⁶ laid down the requirement of the law of confidence. First the information must have the necessary quality of confidence. Secondly, the information must have been imparted in circumstances importing an obligation of confidence.

⁷¹⁴ Piers Morgan, the editor of the Daily Mirror, in his criticism of the Media and Culture Select Committee's findings said that privacy law would protect the rich, famous and powerful including members of parliament. See Byrne, *Privacy laws only protect the rich, editors insist*. The Guardian, June 17 2003. <http://media.guardian.co.uk/medialaw/story>

⁷¹⁵ *Thomas v News Group Newspapers* [2001] EWCA Civ 1233.

⁷¹⁶ [1969] RPC 41.

Thirdly, there must be an authorised use of information to the detriment of the party imparting it.

Hence, breach of confidence affords protection against disclosure or use of information that is not publicly available. The information has been entrusted in circumstances imposing an obligation not to disclose the information without the authority of the person who has imparted it.⁷¹⁷ The law of confidence can be invoked when it is unconscionable to publish private information. The flexibility and adaptability of the law of confidence have made it a viable platform to accommodate privacy matters.⁷¹⁸ Lord Keith clearly said in *AG v Guardian Newspapers Ltd (No 2)* that ‘the right to privacy is clearly one which the law of confidence should seek to protect.’⁷¹⁹

4.6.1 CONFIDENTIAL INFORMATION AND QUALITY OF CONFIDENCE

Information must have the necessary quality of confidence. There is no hard and fast rule to determine the quality of confidence. Megarry VC admits this in *Thomas Marshall v Guinle*⁷²⁰ when he said ‘It is far from easy to state in general terms what is confidential information or a trade secret.’ In relation to a breach of duty of confidence, confidential information must have some interest of a private nature that the claimant wishes to protect.⁷²¹ Basically, the quality of confidence is diminished when information is published or disclosed into public domain.⁷²² In relation to this, Lord Keith viewed that it is a matter of degree whether information is in the public domain.⁷²³

Information may be confidential if a person takes an active step to conceal it from being disclosed. Similarly, the method of acquiring information such as through a secretive or clandestine manner could prove the degree of confidentiality. This is illustrated in

⁷¹⁷ See Robertson, G. and Nicol, A. (2002) *Media Law*. London, 172.

⁷¹⁸ The Younger Committee proposed that the law on breach of confidence as the most effective protection of privacy. para 630.

⁷¹⁹ [1990] 1 AC 109.

⁷²⁰ [1979] Ch 227, 248.

⁷²¹ *A v B plc* [2003] QB 195, 206.

⁷²² Per Megarry J in *Coco v A N Clarke (Engineerings) Ltd* [1969] RPC 41, 47. See also *AG v Guardian Newspapers (No 2)* [1990] 1 AC 260.

⁷²³ [1990] 1 AC 260. See also *Franchi v Franchi* [1967] RPC 149.

*Francome v Mirror Group Newspapers*⁷²⁴ where the Court of Appeal upheld the grant of an injunction restraining the newspaper until trial from publishing any article based on the contents of the taped telephone conversations. In this particular case, the conversations being eavesdropped upon had been obviously private conversations.

Private information, however, does not necessarily amount to confidentiality. This is established in *Mills v News Group Newspaper*⁷²⁵ where triviality of information was considered by the court. The court found that the publication of private information, the claimant's address, is without real risk. Triviality is a factor in assessing whether the disclosure or threatened disclosure amounts to a breach of confidence.

The nature and extent of damage as a consequence of disclosure could also ascertain the degree of confidence. Protection of personal information under breach of confidence covers information, which is communicated as well as acquired by the confidant. It is the substance of information rather than its form that is assessed in giving the protection. There must be some interest of a private nature that the claimant wishes to protect. In this regard, the test to ascertain what is private is whether disclosure would be highly offensive to a reasonable person of ordinary sensibilities.⁷²⁶ Arguably, offensiveness is not the appropriate test because it is wide and subjective. The concept of offensiveness as applied by the court would extend the scope of privacy. Thus, it is relatively vague and subjective because it relies on the normative judgment of the audience. Some people might be offended with a matter that others find reasonable.

In this relation, Fenwick argues that the objective notions of offensiveness should not be the essential issue if protection of informational autonomy is the paramount consideration. According to her, it is the person's ability to apply his or her own standards of openness, which is the focal point in granting the protection.⁷²⁷ This argument presents a tautology since it is obscure to set a standard due to variability of personal openness. On the other hand, Mullender argues that it is questionable to use

⁷²⁴ [1984] 1 WLR 892.

⁷²⁵ [2001] EMLR 41.

⁷²⁶ Per Gleeson CJ in *Australian Broadcasting Corpn v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, 13, quoted by Lord Woolf CJ in *A v B plc* [2003] EWCA Civ 337, 206.

⁷²⁷ Fenwick, H. (2002) *Civil Liberties and Human Rights*. London, Cavendish, 549

offence instead of harm as a basis to ground an invasion of privacy action. This is because offence is vague and might not yield a sufficient weight as opposed to some tangible form of harm.⁷²⁸

In addition, confidential information is not restricted only to written or printed words. An image may properly be regarded as confidential information. For instance, the case of *Prince Albert v Strange*⁷²⁹ involved private etchings and catalogue. Lord Cottenham LC associated the case with a right of privacy⁷³⁰ and granted an injunction based on breach of confidence. Lord Hoffman recognises that a photograph is in principle, information no different from any other information. He emphasised that ‘the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information.’⁷³¹ Likewise, the Court of Appeal in *Douglas v Hello! Ltd* accepted that photographs taken without authority on a private occasion fell within the meaning of confidential information.

On the contrary, confidentiality of information is lost when it is in public domain. Prosser argues that there is no confidentiality in public places ‘since this amount to no more than giving publicity to what is already public and what any one present would be free to see.’⁷³² Nevertheless, privacy is not lost in a semi public place where there exists a degree of secrecy or exclusivity. For instance, a degree of privacy is still retained in the case of Princess Diana when she was photographed in a gymnasium. In this relation, according to the Press Complaints Commission, a private place is a ‘public or private property where there is a reasonable expectation of privacy. Information obtained through clandestine or secretive observation in public places might still retain the necessary quality of confidence.’⁷³³

⁷²⁸ Mullender, R. Privacy in New Zealand: Are There Lessons to be Learned? (1994) *CLJ*, 12-13.

⁷²⁹ (1849) 1 Mac & G 25.

⁷³⁰ Lord Cottenham said ‘where privacy is the right invaded’. Ibid, 47

⁷³¹ *Campbell v MGN Ltd* [2004] 2 AC 457, 478.

⁷³² Prosser, D. Privacy. (1960) 48 *Cal. Law Review* 383, 396.

⁷³³ *R v BSC ex parte BBC* [2000] 3 WLR 1327, 1337.

The scope of confidential information has also been expanded to include private information. Generally, private and intimate information such as medical treatment and health, sexual life, identity, private conduct and acts, private correspondences and conversations are regarded as confidential. According to Parent, personal information is an ‘information about a person, which most individuals in a given time do not want widely known [or which] though not generally considered personal, a particular person feels acutely sensitive about.’⁷³⁴

Obviously, breach of confidence could be developed to accommodate privacy. The crux of the law of confidence actually relates to confidential information. The principles of confidence accord protection to confidential information, which could be extended to privacy by protecting the undue disclosure of personal information. The description of private information as confidential prompts Lord Nicholls to pass a remark that ‘The essence of the tort is better encapsulated now as misuse of private information.’⁷³⁵ In addition, the court in *Stephens v Avery*⁷³⁶ held that private information relating to sexual conduct of an individual was capable of being protected by the law of confidence. Subsequently, in *Argyll v Argyll*⁷³⁷ intimate marital secrets were held to be private information. The court decided to grant the injunction sought to stop disclosure of information. The decision amounts to recognition of the right of the claimant to have her private life kept private. The case established that it is not a pre-requisite that the confider must have disclosed information. The law of confidence will protect information even if the confider does not directly disclose it. Information obtained from a third party who is obliged under duty not to reveal will still be a secret and remain confidential.

The court in *Douglas v Hello! Ltd* further shows the flexibility of the law of confidence. In this case, the court held that the fact that the photographs must have been taken by someone in breach of the express duties of confidentiality was sufficient to make the

⁷³⁴ Parent, W. A. A New Definition of Privacy for the Law. (1983) 2 *Law and Philosophy* 305, 326. Phillipson and Fenwick prefer to apply Parent’s definition of personal information because it covers distress rather than objective offensiveness. See Phillipson, G. and Fenwick, H. Breach of Confidence as a Privacy Remedy in the Human Rights Act Era. (2000) *MLR* 63, 567.

⁷³⁵ [2004] UKHL 22, para 14.

⁷³⁶ [1988] Ch 449.

⁷³⁷ [1967] 1 Ch 302.

photographs confidential information. The court in *Theakston v MGN Ltd* extends the protection to prevent the publication of photograph without consent. The court said:

this protection extended to photographs, taken without consent, of people who exploited the commercial value of their own image in similar photographs, and to photographs taken with the consent of people but who had not consented to that particular form of commercial exploitation, as well as to photographs taken in public or from a public place.⁷³⁸

Similarly, in *Shelley Films Limited v Rex Features Limited*,⁷³⁹ an injunction was granted to restrain the defendant from publishing photographs taken without permission on the set of the film *Frankenstein*.

In relation to this, there is a practical problem as far as private information is concerned. Not all information, either personal or private to an individual comes under the purview of confidentiality. Some personal information cannot be properly described as confidential. For instance, in a case where there is a wrongful disclosure of private information, the availability of information in a public domain would defeat the argument of confidentiality but not privacy. Publication of such information then will result in loss of confidentiality but not privacy. Even though information, such as photographs, is obtained from public places, privacy is still maintained if there is a reasonable expectation against a wrongful disclosure. In this regard, it could be argued that the extension of breach of confidence could sufficiently protect privacy.

4.6.2 OBLIGATION OF CONFIDENCE

In order to take an action for breach of confidence, traditionally, there must be a pre-existing relationship, which makes the confidant under a duty not to disclose. The requirement of obligation of confidence is stressed by Lord Greene MR in *Saltman Engineering Co Ltd v Campbell Engineering*⁷⁴⁰ when he said:

The obligation to respect confidence is not limited to cases where the parties are in contractual relationship...If a defendant is proved to have

⁷³⁸ [2002] EWCH 137, para 78.

⁷³⁹ [1994] EMLR 134.

⁷⁴⁰ [1963] 3 All ER 413.

used confidential information, directly or indirectly obtained from a plaintiff, with the consent, express or implied of the plaintiff, he will be guilty of an infringement of the plaintiff's right.

Breach of confidence protects a disclosure not only by those whose confidence has been reposed but also by third parties who acquire the sensitive information. The element that confidential information be imparted in circumstances importing an obligation of confidence implies that such information must have been voluntarily disclosed or communicated by the confider. This interpretation has been applied in *Malone v Metropolitan Police Commissioner* where the court found that the police did not owe any duty of confidence to the plaintiff. Megarry VC said that a person who uttered confidential information must accept the risk of being overheard by an unknown party.

With regard to this matter, there are two situations where the duty will arise. First, when the confidential information is expressly given to the confidant and he is aware of it. Second, when the information is obtained under circumstances which could make him aware of the confidentiality. A duty of confidence exists not only when a person has an actual notice of confidentiality but also an ostensible notice. Lord Goff in *AG v Guardian Newspapers Ltd (No. 2)* said that a duty of confidence arises when confidential information comes to the knowledge of a person in circumstances where he has noticed, or is held to have agreed, that the information is confidential, and thus he should be precluded from disclosing the information to others. In this regard, Lord Woolf CJ adopted the same approach when he said 'A duty of confidence will arise whenever the party subject to a duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected.'⁷⁴¹

A duty of confidence may be created simply out of a relationship between the parties with no requirement of any express notice from confider to confidant.⁷⁴² A person who carries out illegal recording of private telephone conversations may come under the same obligation as the parties to the conversations to respect the confidential nature of the

⁷⁴¹ *A v B plc* [2002] 3 WLR 542, para 11.

⁷⁴² *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804.

conversations.⁷⁴³ It would be difficult to protect privacy if there must be a prior confidential relationship. The extension of confidential relationship has increased the potential scope of confidence in protecting privacy. As Laws J said:

If someone with a telephoto lens were to take...a photographs of another engaged in some private act, his subsequent disclosure of the photograph would in my judgment...amount to a breach of confidence...In such a case the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence.⁷⁴⁴

This development was noted by the court in *Venables v News Group Newspapers Ltd*.⁷⁴⁵ The court held that a pre-existing relationship was not required to give rise to an obligation of confidentiality. This approach could put the press under an obligation on the basis that a reasonable man would have realised that the information received should be kept confidential. Butler-Sloss P stated that:

The duty of confidence may arise in equity independently of a transaction or relationship between parties...A duty of confidence does already arise when confidential information comes to the knowledge of the media, in circumstances in which the media have notice of its confidentiality.⁷⁴⁶

Breach of confidence has its limitation in accommodating privacy in general. The distinction between a breach of confidence and privacy is that, the former preserves secrecy and the latter is against publicity.⁷⁴⁷ In addition, privacy is not relation-based as required under confidence.⁷⁴⁸ Phillipson and Fenwick argue that the scope of law of confidence might possibly be inadequate to encompass situations where there has clearly been some invasion of privacy but does not involve personal information.⁷⁴⁹ The framework of confidence could arguably be said as inappropriate to cover cases involving

⁷⁴³ *Francome v Mirror Group Newspapers* [1984] 1 WLR 892.

⁷⁴⁴ *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, 807.

⁷⁴⁵ [2001] Fam 340.

⁷⁴⁶ *Ibid*, para 81.

⁷⁴⁷ See Wacks, R. (1995) *Privacy and Press Freedom*. London, 78. See also Tugendhat, M. and Christie, I. (2002) *Law of Privacy and Media*. Oxford, 124.

⁷⁴⁸ Morgan, J. Privacy, Confidence and Horizontal Effect: "Hello" Trouble. (2003) 62(2) *CLJ* 444, 449.

⁷⁴⁹ Phillipson, G. and Fenwick, H., Breach of Confidence as a Privacy Remedy in the Human Rights Act Era. (2000) *MLR* 63, 567.

invasion of privacy such as in the case of *Kaye v Robertson*.⁷⁵⁰ Although the development of the law of confidence is conducive for protection of privacy, it may not be extensive enough to cover the situation in *Peck v United Kingdom*.⁷⁵¹ In this case the ECtHR has ruled that a breach of confidence is not an appropriate action in the circumstances of the case. Once the information is in a public domain, its repeated publication can no longer be considered a breach of confidence under English law but could nevertheless constitute an infringement of Article 8.

The common law development with regard to breach of confidence is a welcome effort to fill the gap in the absence of specific law on privacy.⁷⁵² Judicial recognition on the right of privacy in the case of *Douglas v Hello! Ltd* and *Campbell v MGN Ltd* indicates that the right is as important as free speech. The courts are prepared to give horizontal effect to the Convention right under the existing legal framework. Campbell's case is significant in the evolution of right to privacy in the UK. In this case, Naomi Campbell brought an action for breach of confidence and breach of the Data Protection Act 1998 against the publishers of the Daily Mirror. The press published articles revealing that she was receiving treatments for drug addiction and photographs which showed her leaving a Narcotics Anonymous session. The decision established that there is a protection on informational privacy.

A claim based on the publication of private information must establish whether the information is sufficiently private, thus warrant protection under Article 8. This is determined by satisfying the test of reasonable expectation of privacy. The House of Lords decided that there is a remedy for the wrongful disclosure of private information under breach of confidence. In relation to this, Lord Hope criticised the Court of Appeal's approach in emphasising on the mind of the reader rather than the mind of the person who is affected by the publicity. Arguably, the approach that confines the expectation of privacy to the affected person expands the protection of one's private life. In this regard, the case of *Peck v UK* illustrates the point where expectation of privacy of a person in a

⁷⁵⁰ [1991] FSR 62.

⁷⁵¹ [2003] 36 EHRR 41.

⁷⁵² In contrast, breach of confidence is not regarded as an appropriate approach for protection of privacy. See *Hosking v Runting* (2005) 1 NZLR 1.

degrading situation on a public street could be absent if the expectation is from the mind of the reader's perspective.

The House of Lords in *Campbell v MGN* recognised the importance of both rights under Article 8 and Article 10. Neither right takes precedence over the other. On the premise of parallel analysis, both Article 8 (2) and Article 10 (2) recognise the rights and freedom of others. On this basis, the HOL held that the right to privacy is central to an action of breach of confidence. Therefore, the right must be balanced with the right of the media to impart information to the public, *vice versa*, the media's right to impart information must be balanced with the respect given to private life. The restrictions imposed on right to free expression must be rational, fair and not arbitrary. Restrictions also must not impair the right more than necessary. This is based on the principle of proportionality. The majority held that the treatment for addiction was private and akin to medical information. The disclosure of details could interfere with, or disrupt Campbell's treatment. Thus the publication of such intrusive material could not be justified.

The development in this area may further be influenced by the decision of the ECtHR in *Von Hannover v Germany*.⁷⁵³ In this case the ECtHR recognised the importance of private life and free expression. In relation to balancing Article 8 and 10, the ECtHR found that although Princess Caroline was a well known public person, she did not exercise any official function. The Court therefore decided that the general public did not have a legitimate interest in knowing about the Princess's private life, even if she appeared in public places and was likely to be recognised by the public. The court stated clearly that a fundamental distinction had to be drawn between the 'watchdog' function of the press in reporting facts capable of contributing to a debate in a democratic society, and reporting the details of the private life of an individual who did not exercise official functions. In determining the correct balance between Article 8 and 10, the ECtHR emphasised on the contribution of the publication to a debate of general interest. The Court found that such contribution was absent in the case of Princess Caroline. Thus, contribution to a debate of general interest is a decisive factor in protecting informational privacy.

⁷⁵³ (2004) 40 EHRR 1.

The expansion of breach of confidence provides a remedy for wrongful publication of private information. Nevertheless, the law of confidence is not satisfactory to embrace unjustified invasion of privacy. The right to be let alone, such as strip-searched, is an aspect of privacy that does not involve disclosure of information. This is beyond the scope of law of confidence. An intrusion into private premises or surveillance using audio-visual devices does not cover unauthorised disclosure under the law of confidence. The case of *Peck v UK*⁷⁵⁴ illustrates the inadequacy of breach of confidence. The ECtHR held that the applicant did not have an actionable remedy in breach of confidence and had no effective remedy in relation to the disclosures by the local authority. The House of Lords in *Wainwright's* case viewed that the reform of privacy law 'can be achieved only by legislation rather than the broad brush of common law principle.' In addition, not all confidential information is private. Loss or lack of confidentiality does not mean that there is no infringement of privacy. Therefore, the disclosure of a private photograph that has previously been published to the public can still amount to infringement of privacy.

The influence of the ECHR in shaping the legal landscape in the UK is evinced by the incorporation of the Convention rights in the Human Rights Act 1998. However, it is uncertain as to what extent the ECHR influences the development of private law particularly with respect to privacy in the UK. The ECtHR in *Von Hannover* imposed positive obligation on the State to protect right to privacy which "may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves". The positive obligations to protect privacy means the courts must accord protection to the privacy rights of private individuals against media intrusion. In order to have a clearer picture of the situation, the following discussion will examine the influence of the ECHR in the UK.

4.7 THE INFLUENCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The incorporation of the European Convention on Human Rights through the Human Rights Act 1998 has changed the landscape of the national legal system. Section 2 (1) of the Act provides:

⁷⁵⁴ (2003) 36 EHRR 41.

A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any-
(a) judgement, decision, declaration or advisory opinion of the European Court of Human Rights.

It is clear from the above provision that the courts have the duty to take into account the jurisprudence of the European Court of Human Rights. Clayton et al suggest that the effect of this section imposes a duty to consider the relevant case law for the purposes of making adjudication.⁷⁵⁵ However, the duty to take into account or to consider does not make the European case law as a binding authority on the courts in the UK.⁷⁵⁶ On the other hand, the Convention rights have become part of the domestic legal principles. This is clear when the protected rights under Article 8 and 10 are absorbed in the established action for breach of confidence. In this regard, Lord Woolf said:

The court's approach to the issues which the applications raise has been modified because under section 6 of the 1998 Act, the court, as a public authority, is required not to act 'in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into long-established action for breach of confidence.⁷⁵⁷

Another main impact is on the judicial system in general. In relation to the Convention rights, the European Court of Human Rights will be the final court for an action involving a breach of Convention rights. This means that the ECtHR in Strasbourg can overturn the House of Lords' decisions. For instance, in the case of *Sunday Times v United Kingdom (No 2)*, the Court decided that the House of Lords had violated the right to free expression guaranteed by the Convention.

Furthermore, a person can bring an action to the European Court for violations of the Convention rights only to the extent that the rights are incorporated into the national law. It is a requirement that the applicant must have exhausted all domestic remedies. In *Earl*

⁷⁵⁵ Clayton, R., et al (2002) *The law of Human Rights*. Oxford University Press.

⁷⁵⁶ Clive, S. (2002) *Freedom of Information*. London: 631. Grosz concluded that the provision 'must take into account' in section 2 (1) gives weaker direction and thus the Strasbourg jurisprudence is only persuasive. See Grosz, S., et al (2000) *Human Rights: The 1998 Act and the European Convention*. London, Sweet & Maxwell, 16.

⁷⁵⁷ *A v B plc* [2003] QB 195, 202.

*Spencer v The United Kingdom*⁷⁵⁸ the Court found that the applicant had not exhausted his domestic remedies. In this regard, the Court concluded that the law on breach of confidence as extended and developed by the domestic courts could provide remedy for an invasion of privacy.⁷⁵⁹

Thus, the Convention serves as an impetus for a legal change in the national law. The duty to act compatibly with the Convention rights imposed by the Human Rights Act 1998 does not only involve the courts, but the government as well in changing substantive laws.⁷⁶⁰ Section 6 (1) of the Human Rights Act 1998 provides:

It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

Most of the changes in the national law occur when the European Court found that the state act is incompatible with the Convention. In relation to the United Kingdom, changes in law as a result of incompatibility are not obligatory.⁷⁶¹ The House of Lords in *A & Ors v Secretary of State for the Home Department*⁷⁶² affirm this when Lord Bingham said that if primary legislation is declared to be incompatible the validity of the legislation is unaffected. The remedy, therefore, lies with the appropriate minister who is answerable to Parliament. However, this might restrict reliance on the margin of appreciation accorded to the state. In *Goodwin v United Kingdom*⁷⁶³ for instance, the Court found that the respondent's state could no longer exercise its margin of appreciation in situation relating to post-operative transsexual because nothing has effectively been done by the respondent's state to put the matter under review.

⁷⁵⁸ [1998] 25 EHRR 105.

⁷⁵⁹ This is in contrast with the decision in *Winer v United Kingdom* (1986) 48 DR 154 where the Court said that breach of confidence did not provide adequate remedy on the ground that the scope of the cause of action was uncertain.

⁷⁶⁰ The Interception of Communication Act 1985 (now replaced by the Regulation of Investigating Powers Act 2000) was the response of the United Kingdom to the finding by the European Court of Human Rights in *Malone v United Kingdom*. The reform of the law of contempt by the Contempt of Court Act 1981 was the result of *Sunday Times v United Kingdom*. The amendment of the Employment Act 1982 particularly section 2 was the result of the decision in *Young, James and Webster v United Kingdom*. Abolition of corporal punishment by the Education (No 2) Act 1986 was the result of *Campbell and Cosans v United Kingdom*. *Goodwin v United Kingdom* led to changes involved identity of transsexuals.

⁷⁶¹ Starmer, K. Two Years of the Human Rights Act. (2003) 1 EHRLR 14, 19.

⁷⁶² [2004] UKHL 56, para 42.

⁷⁶³ (2002) 35 EHRR 447.

The judgments and decisions of the ECtHR can also be useful resources in resolving ambiguities in domestic laws. This is pertinent since the courts in the United Kingdom have a duty to act compatibly with the Convention rights. In relation to this, the Convention helps to inform the common law in articulating some of the principles underlying the law. For instance, the right of privacy under Article 8 is dealt with under the expansion of the principles of confidence. This shows that a common law could be developed to fill the gap to protect individual rights in the absence of statutory provision.

4.7.1 PRIVATE LIFE UNDER THE ECHR

Right of privacy is guaranteed under the European Convention on Human Rights. Article 8 provides:

Everyone has the right to respect for his private and family life, his home and his correspondence.

Although the article does not specifically provide for a right of privacy, the right to respect for private life implies such a right. Private life under Article 8 has been given a wider meaning.⁷⁶⁴ It does not create hermitical life in which the individual may live his own personal life as he chooses and to exclude entirely the outside world.

The concept of a private life covers both the physical and moral integrity of a person. In *Bota v Italy*⁷⁶⁵ the Court held that a private life ‘includes a person’s physical and psychological integrity: the guarantee afforded by article 8...is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings.’ In *X v Iceland* the court said that a private life comprises the right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfillment of one’s own personality.⁷⁶⁶ The definition expounded by the Court goes beyond the protection of an intimate sphere of personal autonomy.

⁷⁶⁴ See *Peck v United Kingdom* (2003) 36 EHRR 41, para 57. The Court said that private life is a broad term not susceptible to exhaustive definition.

⁷⁶⁵ (1998) 26 EHRR 241, para. 32.

⁷⁶⁶ (1976) No 6825/74. See also *Niemietz v Germany* (1992) 16 EHRR 97, para 29.

Even though certain acts may affect the physical or moral integrity of a person, it does not always necessarily amount to an interference of private life. The adversity of the act will determine whether it comes under the scope of Article 8. For instance, the Court in *Costello-Roberts v United Kingdom*⁷⁶⁷ held that the nature of the corporal punishment in a school was not sufficiently adverse to amount to a violation of Article 8. The implication of the right to respect for private life is that it requires the state to take positive steps to establish laws, which protect the right. In this regard, the Court in *X and Y v The Netherlands* said:

In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.⁷⁶⁸

Obviously, the main purpose of article 8 is to protect individuals against arbitrary interference by the public authorities. This is stated in Article 8 (2):

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest of national security, public safety and the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

The provision clearly imposes negative obligation on the public authority not to act in a way that interferes with a private life. In certain circumstances, the article may impose a positive obligation on the state to ensure protection of the right. This obligation may be in the form of adopting measures to secure the right by providing effective remedies through the law. The obligation also requires the state to take positive measures to secure the fulfillment of the right among private individuals. Failure to observe such an obligation by the state will constitute a violation of Article 8. For instance, in *Regina v Secretary of State for the Home Department*⁷⁶⁹ the claimant sought declaratory relief and damages under the 1998 Act against the Home Secretary on the ground that the acts or

⁷⁶⁷ (1995) 19 EHRR 112.

⁷⁶⁸ (1985) 8 EHRR 235, 239-240.

⁷⁶⁹ [2003] TLR 134.

omissions of agencies and officials had subjected him to a treatment contrary to Article 3. He argued that there had been an interference with his private life contrary to Article 8. The court relied on the test used by the court in *E and Others v United Kingdom*⁷⁷⁰ in order to establish whether a positive duty could be implied. According to the test a defendant would be liable for infringement of a Convention right such as those set out in Article 3 or 8 where:

1. The defendant was or ought to have been aware that the claimant was suffering or at risk of treatment of the kind necessary to engage Article 3 or of harm of the kind necessary to engage Article 8.
2. The defendant then did not take steps reasonable open to him to protect the claimant from the treatment of the kind necessary to engage Article 3 or from the harm necessary to engage Article 8; and
3. Those measures could have had a real prospect of altering or mitigating the harm suffered by the claimant.

Silber J. then found that an obligation had been imposed on the Home Secretary to take steps reasonably open to him to protect the claimant from infringement of his Article 8 rights. However, that obligation was not complied with.

Additionally, Harris et al suggest that intrusive activities of private individuals such as newspaper reporters ought to come under the obligation to respect private life in Article 8.⁷⁷¹ This is in accordance with the Resolution 428 of the Council of Europe, which states that the right to privacy under Article 8 should extend to interference by private persons including the mass media.

On the other hand, the requirement of positive obligation should be balanced with the considerations outline in Article 8 (2). The state enjoys a wide margin of appreciation when deciding the extent of positive obligation under Article 8.⁷⁷² The Court in *Rees v United Kingdom*⁷⁷³ concluded that a fair balance has to be struck between the general

⁷⁷⁰ [2002] TLR 514.

⁷⁷¹ Harris, D. J. et al (1995) *Law of the European Convention on Human Rights*. London, 310.

⁷⁷² However, this margin goes hand in hand with the European court supervision. See *Funke v. France* (1993) 16 EHRR 297.

⁷⁷³ (1986) 9 EHRR 56.

interest of the community and the interests of the individual. The Court took into account the wide margin of appreciation afforded to the state and the protection of the interests of others when it refused to extend positive obligations arising from Article 8 to maintain the secrecy of a sexual identity change. However, the Court also expressed the need for appropriate legal measures to be kept under review having regard to scientific and societal developments. In *Sheffield and Horsham v United Kingdom*⁷⁷⁴ the Court held that the non-recognition of change of gender by post-operative transsexual persons did not constitute a violation of Article 8. However, the state is still entitled to rely on the wide margin of appreciation to defend its refusal in recognizing the law of post-operative transsexual's sexual identity. The Court was critical of the United Kingdom's failure to take any steps to keep this area of the law under review.

The margin of appreciation is not applicable when there is a constant failure by the state to review domestic law. In recent case *Goodwin v United Kingdom*⁷⁷⁵ the Court unanimously held that there had been violation of the right to respect for private and family life under Article 8 of the Convention. The unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite of being one gender or the other is no longer sustainable. The Court concluded that since there are no significant factors of public interest to weigh against the interest of applicant in obtaining legal recognition of her gender reassignment, the fair balance that is inherent in the Convention tilts decisively in favour of the applicant. In striking a balance in the present case, the Court 'considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.'⁷⁷⁶

Even though privacy is recognised as a fundamental right, other interests in accordance with the law can override it. Article 8 (2) outlines the overriding interests, which include national security, public safety, economic well being, prevention of health or morals and rights and freedoms of others. The Court in *Malone v United Kingdom*⁷⁷⁷ held that the

⁷⁷⁴ (1998) 27 EHRR 163.

⁷⁷⁵ (2002) 35 EHRR 447.

⁷⁷⁶ Ibid, para 91.

⁷⁷⁷ (1985) 7 EHRR 14.

requirement, which is in accordance with the law, does not merely reflect domestic law but also relates to the quality of the law. The law must be accessible for the people to be able to have an adequate indication of the legal rules that will be applicable to any case. In addition, the law also must be formulated with sufficient precision to enable a person to regulate his conduct.⁷⁷⁸ In this case the Court decided that the UK system for authorising interceptions had failed according to law test. This is because at the particular time it could not be said with certainty which elements in the arrangements were incorporated in legal rules and which one depended entirely on the discretion of the executive.

It is unclear whether the application of the Convention rights in the domestic law does give power to the courts to declare a new law. The duty imposed by section 6 of the Human Rights Act 1998 should serve as a platform for the courts to fashion a new law, especially in an area that could not be consolidated sufficiently into other existing laws. Prior to the introduction of the Human Rights Act 1998, it seems unlikely for the courts to use the Convention as the basis to create a new law. This is because the courts are not duty bound to abide by the Convention. However, with the incorporation of the Convention rights into domestic legislation, the development of common law should be in tandem with the Convention. The development should be informed by the right principle permeates in the Convention.

There is a distinction between privacy and confidence. This is illustrated in the case of *Peck v United Kingdom*.⁷⁷⁹ In this case, the applicant complained that the disclosure by the Council of the relevant CCTV footage, which resulted in the publication and broadcasting of identifiable images of him, constituted a disproportionate interference with his right to respect for his private life guaranteed by Article 8 of the Convention. The present applicant was in a public street but he was not there for the purposes of participating in any public event and he was not a public figure. The applicant's identity

⁷⁷⁸ See *Khan v United Kingdom* (2000) 8 BHRC 310. The Court concluded that at the relevant time there existed no statutory system to regulate the use of covert recording devices by the police. The interferences disclosed by the measures implemented in respect of the applicant were therefore not "in accordance with the law" as required by the second paragraph of Article 8 and there has accordingly been a violation of this provision.

⁷⁷⁹ (2003) 36 EHRR 41.

was not adequately, or in some cases not at all, masked in the photographs and footage so publicly published and broadcasted. The respondent's government submitted that the regime of legal protection, which existed adequately, protected the applicant's rights. They pointed out that the common law and statutory remedies collectively provided a comprehensive regime of legal protection for privacy and therefore performed substantially the same function as a law of privacy. They considered the breach of confidence as the most relevant remedy. The Court considered that the facts of this case were sufficiently different from those in *Earl Spencer's* case as to allow the Court to conclude that the present applicant did not have an actionable remedy in breach of confidence at the relevant time. In addition, the Court said that the applicant would have had much greater difficulty in establishing that the footage disclosed had the "necessary quality of confidence" about it or that the information had been "imparted in circumstances importing an obligation of confidence". The Court then found that the applicant had no effective remedy in relation to the violation of his right to respect for his private life guaranteed by Article 8 of the Convention.

There are concerns that the long tradition of parliamentary sovereignty as the cornerstone of the United Kingdom's constitution might be sacrificed. The perception is that the Convention can dictate in shaping the domestic law especially the protection of human rights.⁷⁸⁰ The main effect of the European Convention on Human Rights is the change in approach to the protection of human rights. It also brings about the statutory recognition of human rights as part of the domestic law. Nevertheless, despite changes, the ECHR also creates uneasiness among those who argue for national sovereignty. The introduction of the Human Rights Act 1998 means that the Convention as well as the European Court of Human Rights have played a significant role and will continue to influence the development of the domestic laws in the United Kingdom. Currently, as far as privacy is concerned, there is a progressive recognition of right of privacy in the UK but access to the right could only be done through the ECHR.⁷⁸¹

⁷⁸⁰ see Lord Woolf (2003) *Solemn Hearing of the European Court of Human Rights*.
<http://www.echr.coe.int/eng/Speeches>

⁷⁸¹ Lord Irvine. (2003) *Human Rights, Constitutional Law and the Development of the English Legal System*. Oxford, 132.

4.7.2 EXPRESSION UNDER THE ECHR

The UK is one of the countries that have specific legislation dealing with human rights. The formulation of the Human Rights Act 1998 is the result of long debates and pressure from within and without the United Kingdom. The Act creates a statutory scheme giving effect to the Convention rights without limiting pre existing common law jurisprudence.

Section 2 (1) of the Act provides that a domestic court or tribunal in determining a matter that concerns the Convention rights must take into account any judgment, decision, declaration, or advisory opinion of the European Court of Human Rights (ECtHR). This provision reflects the influence of the Convention particularly regarding the Convention rights. The application and reference made to the ECtHR is on the persuasive authority rather than binding precedent.⁷⁸² The unique common law principle of binding precedent (*stare decisis*) is applicable only to domestic courts and it does not extent to other judicial systems. This is the position of the United Kingdom, which adopts the dualist approach by delineating the executive act and legislative action. In this regard Lord Oliver said:

Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation.⁷⁸³

Therefore, it is safe to say that the findings of the European Court on Human Rights by itself is not part of the English law, though the United Kingdom government has agreed to abide by decisions of the Court as a signatory member, which is an executive act. On the other hand, the English courts, as public authorities under the Human rights Act 1998, have an obligation to act compatibly with the Convention rights. This is provided in section 6 (1) of the Act that says:

It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

The provision allows the application of ECtHR jurisprudence pertaining to the Convention rights. In addition, section 3 (1) of the Human Rights Act 1998 provides that

⁷⁸² Feldman, D. The Human Rights Act 1998 and Constitutional Principles. (1999) *Leg. Stud.*, 191.

⁷⁸³ See *J.H Rayner (Mining Lane) v Department of Trade and Industry* [1900] 2 AC 418, 500.

domestic legislation must be read and given effect in a way which is compatible with Convention rights. The validity of domestic legislations is not affected if there is any incompatibility.⁷⁸⁴ Moreover, the requirement of compatibility is not set in imperative form because section 3 (1) provides ‘So far as it is possible to do so...’

Not all welcomes the application of the Convention in domestic legal landscape. The dissentients believe that domestic laws and system are capable to tackle domestic affairs. The abdication of the sovereignty is the main reason for the rejection of the application. To them domestic legal disputes should not be resolved by foreign judges who are not familiar with domestic legal culture. The application is viewed as an importation of foreign elements into local arena. This argument is based more on sentiments to protect national dignity and sovereignty. Looking from a different perspective, the application of the Convention is a process of amelioration at regional level that relates to matters of common values and characters such as human rights.

In relation to this, the judiciary is not speaking with the same tone when it comes to the willingness to have regard to the Convention. Lord Keith who concurred with the observation of Lord Goff in *A-G v Guardian Newspaper (No 2)* opined that ‘the common law of England is consistent with the obligation assumed by the Crown under the treaty...’ They did not find it necessary to refer to the Convention because they believed that the common law fully matched Article 10.⁷⁸⁵ On the other hand, in *Venables v News Group Newspapers Ltd*⁷⁸⁶ Dame Elizabeth Butler-Sloss viewed that:

The common law continues to evolve, as it has done for centuries, and is being given considerable impetus to do so by the implementation of the Convention into our domestic law.⁷⁸⁷

The Convention can be relied on in providing a contextual background in case the law is either unclear or ambiguous, or concerns an issue not yet ruled on as indicated by the House of Lord.⁷⁸⁸ This is put into practice when the court in *A-G v Guardian (No 2)*

⁷⁸⁴ Section 3 (2) (c) of the Human Rights Act 1998.

⁷⁸⁵ *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.

⁷⁸⁶ [2001] 2 WLR 1038.

⁷⁸⁷ *Ibid*, 1064.

⁷⁸⁸ *Op. cit.*, n. 334.

relied on the interpretation of Article 10 as established by the ECtHR on limitation of free expression in the interests of national security. Article 10 of the Convention has become part of national law by virtue of the Human Rights Act 1998.

It is hard to deny that the Convention has also fashioned a broad perspective of freedom of expression. There are cases where the ECtHR weighs heavily on press freedom of expression. In *Sunday Times v United Kingdom*⁷⁸⁹ the Court held that the interference by the English court did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression. This case has caused the British government to change the law on contempt of court. In the famous Spycatcher case, the Court did not accept national security as a sufficient reason to prohibit publication.

The present Labour government has pledged to modernize British politics by, among others, increasing individual rights based on the ECHR. One of the reasons given to support this move is the awareness that common law is not sufficient.⁷⁹⁰ One pertinent question is that if the commitment is strong why not embrace the Convention that gives protection to fundamental rights? The willingness to accept the Convention without full implementation is the result of dualist approach practiced by the government. Perhaps the unwillingness to allow too much foreign influence in dictating domestic legislative matters contributes to the half-baked commitment to the Convention rights. More importantly, this is entirely an executive act.

4.8 CONCLUSION

Obviously, the introduction of the Human Rights Act 1998 has a significant impact on the development of privacy in the UK. Though the right of privacy is recognised through the incorporation of the Convention rights, the scheme of the HRA creates a vertical application of the right. Nevertheless, the obscurity of the public authority requirement under the Human Rights Act 1998 could give room for a horizontal application of the right. This is achievable by the commitment of the judiciary through their judicial activism in protecting fundamental rights.

⁷⁸⁹ (1979) 2 EHRR 245.

⁷⁹⁰ See Lord Keith in *Derbyshire County Council v Times Newspapers Ltd* [1993] 1 All ER 1011, 1020.

The incremental development in protecting privacy through the extension of the doctrine of confidence is the manifestation of liberal approach and judicial activism. Undoubtedly, this approach could ward off permanent denial of a right of privacy. Though the effort to secure the right of privacy is a progressive development, the incremental development is rather unsatisfactory because it creates uncertainty in this area of law and provides incomplete protection to privacy. It is undeniable that the limit of the doctrine could not satisfactorily afford protection to privacy. Arguably, Parliament is better equipped and democratically qualified to introduce law in this area. Nevertheless, it is doubtful for such an introduction in the foreseeable future due to fearful of media disapproval. The government's rejection to a recent call for privacy law is a testimony for the unforthcoming legislative commitment.

Accordingly, if full protection is to be accorded against press invasion, horizontal effect of the Convention rights is pertinent. A complete and direct application of the Convention rights could secure the protection of privacy. In the UK, judges have been cautious in their approach to the development of the law. If caution is warranted in the British context, then a cautious approach seems to be the apposite in the Malaysian context. This leads to the next discussion on privacy in Malaysia.

CHAPTER 5

PRIVACY IN MALAYSIA

5.0 INTRODUCTION

The emergence of human rights discourse in Malaysia has revitalised the constitutional significance of fundamental rights. It also helps towards educating and instilling a better awareness of fundamental rights among the public. Malaysia's active participation in the United Nations Commission on Human Rights in 1990's has also accelerated deliberations on human rights issues at the national level. The impact of this development has enabled the people to voice up their concerns on human rights and thus calls for its protection.⁷⁹¹

The active propagation of the human rights agenda by independent organisations has brought about changes in public perception regarding the scope of the subject that is previously focused on bread and butter issues. This is advocated through the existence of several non-governmental organizations (NGO) such as *SUARAM*,⁷⁹² *HAKAM*,⁷⁹³ *ALIRAN*⁷⁹⁴ and statutory bodies such as the National Human Rights Commission (SUHAKAM) and the Bar council of Malaysia.

The above mentioned non-governmental organisations play an important role as a pressure group in lobbying the government to create a better environment and protection of human rights as embedded in the Universal Declaration of Human Rights 1948 (UDHR) and the International Covenant on Civil and Political Rights 1966 (ICCPR). Their affiliation and link with international watchdog bodies such as the Amnesty International has enabled domestic issues on human rights be heard and publicised abroad.⁷⁹⁵ Consequently, it creates an international pressure on the government to

⁷⁹¹ There are calls for the abolishment of restrictive laws such as the Internal Security Act 1960, Sedition Act and Printing Presses and Publication Act 1984. See <http://www.aliran.com/>

⁷⁹² <http://www.suaram.net/>

⁷⁹³ <http://www.hakam.org/home.htm>

⁷⁹⁴ <http://www.aliran.com/>

⁷⁹⁵ Amnesty International produces yearly report on the condition of human rights worldwide.

improve its domestic situation. Though such a pressure has a minimal impact on the government, Malaysia needs to put into practice the commitment made under international treaty such as the International Covenant on Civil and Political Rights (ICCPR). The culmination of this development is the recognition by the government regarding the importance of human rights issues with the creation of the Human Rights Commission in 1999.

Although Malaysia is a signatory of the UNCHR, it does not mean that Malaysia is legally obliged to accede to the principles enshrined in the instrument particularly in respect to right of privacy. The instrument has no legal binding on the domestic legal system. It does not constitute as part of Malaysian law, unless it is incorporated into local statutory legislation. Siti Norma FCJ in *Mohamad Ezam Bin Mohd Noor v Ketua Polis Negara*⁷⁹⁶ reiterates the status of such an instrument in the domestic context when she said:

Reference to international standards set by the Universal Declaration of Human Right 1948 ('the 1948 Declaration') and several other United Nations documents on the right of access cannot be accepted as such documents were not legally binding on the Malaysian courts.⁷⁹⁷

Therefore, matters pertaining to fundamental rights in Malaysia must be in accordance with the supreme law of the land, the Federal Constitution. Article 4 (1) of the Constitution proclaims that:

This Constitution is the supreme law of the Federation and any law passed after *Merdeka* Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Arguably, the concept of the fundamental rights in the Constitution such as freedom of expression, freedom of association, right to life and freedom of religion is similar to those rights widely recognised under the international instruments. However, the application of

⁷⁹⁶ [2002] 4 MLJ 449.

⁷⁹⁷ Ibid, 513.

the concept at domestic level is not align with the universal practice particularly as acclaimed under the Western liberal democracy. Apparently, there is a lack of consensus *ad idem* in this aspect due to the emphasis on local particularities, which necessitate the domestication of the fundamental rights concept. This is reflected in the next discussion on right of privacy, which we now turn to.

5.1 PRIVACY UNDER THE CONSTITUTION

The Federal Constitution governs human rights in Malaysia. Section 2 of the Human Rights Commission of Malaysia Act 1999 provides that the meaning of ‘human rights’ refers to fundamental liberties as enshrined in Part II of the Federal Constitution. This provision confines the scope of human rights law in Malaysia to several fundamental rights as provided by the Constitution. The confinement of human rights to those set out under the constitutional liberties is unsatisfactory. It limits the development of a wide range of human rights issues within the scope of fundamental rights as enshrined in the constitutional provisions. For instance, right of privacy is absent under the fundamental liberties catalogue in the Malaysian Constitution. The effect of this is that other interests such as free expression can always override privacy, as there is no constitutional protection.

Although the fundamental rights in the Constitution are proclaimed in the form of positive rights, several distinct countervailing interests qualify them.⁷⁹⁸ The scope of these interests is determined by Parliament whose legislative power is controlled by the ruling party. As a result, the human rights development in Malaysia depends on the commitment of the government to pursue the matter as part of its political agenda. In this context, a question that should be addressed, therefore, is not about the existence of human rights in the domestic arena but the restrictiveness of the qualifications that curtailed the exercise of human rights.

Arguably, privacy as an aspect of human rights is not a priority on the human rights agenda in Malaysia. Privacy gains a considerable interest only after the emergence of

⁷⁹⁸ Article 10 (2) of the Federal Constitution.

human rights culture and awareness in the society especially after the creation of the Human Rights Commission in 1999. The lack of interest in privacy can be attributed to several reasons. First, the Federal Constitution does not specifically recognise the right to privacy. However, it does provide for several related rights, such as liberty of a person⁷⁹⁹ and right to property.⁸⁰⁰ Right of privacy, which is widely recognised in 1948 through the Universal Declaration of Human Rights, is not part of the fundamental rights scheme deemed necessary by the framers of the Federal Constitution in 1956. Nevertheless, protection of reputation under defamation, a privacy-related interest, is recognised under the constitutional scheme as one of the interests that can override freedom of speech and expression.⁸⁰¹

Even though the Constitution provides for fundamental rights, the emphasis under the constitutional framework appears to be more on civil and political rights. This is because political rights are the most restricted rights under the Constitution. The immunity of qualifications imposed on political rights from judicial scrutiny, such as freedom of speech and expression, implicitly creates a gradation of right. This may be inferred from the interests in Article 10 (2) (a) that is wide and inhibitive. The article provides:

Parliament may by law impose-

On the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence.

In addition, Article 4 (2) (b) provides that:

The validity of any law shall not be questioned on the ground that-

⁷⁹⁹ Article 5 of the Federal Constitution.

⁸⁰⁰ *ibid* Article 13.

⁸⁰¹ *ibid* Article 10 (2) (a).

(b) it imposes such restriction as mentioned in Article 10 (2) but those restrictions were not deemed necessary or expedient by Parliament for purposes mentioned in that Article.

By reading both provisions together, it shows that although political rights exist in Malaysia, the rights are subjected to a wide scope of restrictions.

The second reason for the lack of interest in privacy is due to the fact that there is no urgency in dealing with privacy issue. Perhaps, this is because the primary focus of the government is satisfying the basic needs of the people. Issues relating to distribution of wealth, security, education and eradication of poverty take priority over issues such as protection of individual privacy and private lives. Matters pertaining to personal privacy, like freedom of speech and expression, are considered as luxuries that cannot be afforded by the states, at least until economic development eradicates poverty and assure basic economic and social rights.⁸⁰² In this regard, the discourse of human rights is rather a bourgeois subject matter. As far as Malaysia is concerned, there is a gradation between civil and political rights on one hand and economic and cultural rights on the other. The former is given more emphasis especially in realising the government's aspiration to make Malaysia as a developed country under the 'Vision 2020'. Even though SUHAKAM believes and affirms the indivisibility of all human rights, at the same time SUHAKAM acknowledges that economic, social and cultural rights have been in the shadow of civil and political rights.⁸⁰³

The third reason is, majoritarianism, where preference is given to the collective rights and interests of the society rather than to an individual interest, is a prevalent practice in Malaysia. In other words, the need to protect the well being of the society as a whole permits the toleration of individual right such as personal privacy. This is reiterated by the former Deputy Prime Minister when he said that 'In Malaysia, we believe that the rights of the individual cannot be allowed to supersede the sanctity and security of the majority. In some situations, the government has no alternative option. Measures, which

⁸⁰² Abraham, C. Freedom of Speech for Whom? The Malaysian Case. (1998) 3 MLJ 1, 4

⁸⁰³ Navaratnam, R. Economic, Social and Cultural Rights- Accessibility to Basic Needs.
http://www.suhakam.org.my/docs/press_room/Speech310703.pdf

restrict the exercise of individual human rights, become necessary.’⁸⁰⁴ Therefore, privacy is not regarded as an intrinsic right that warrants specific or equal protection.

The aspiration to turn Malaysia into a developed country intensifies activities for economic and social developments. The transformation of Malaysia from an agricultural based country to an industrial country plays a role in setting the government’s policies and priority. Currently, the priority appears to be the well being of the nation through economic prosperity as well as political stability. In order to achieve this state of affairs there is a need for a harmonious and tolerant society. The existence of majoritarianism suggests that the harmony and tolerance come at a price. Since the well being of the nation as a whole is the utmost important, the minorities must fit in with the goals pursued by the government.

Fourthly, the lack of deliberation on privacy may also be attributed to the attitude of the society, which renders the subject more appropriate to be resolved in accordance with the culture and customary moral principles. Privacy as a value acclaimed a high regard in the social life of Malaysian society. From the perspective of the local culture, invasion of personal privacy is morally despicable. For instance, Malay customary practices abhorrence of any conduct deemed to interfere with other people’s affairs. It is regarded as an immoral conduct to invade into other person’s privacy.⁸⁰⁵

The customary practice may have the influence of Islamic teachings, which have been practiced by the Malays. The influence may find its basis on the status of Islamic law, which was recognised as the *lex loci* of the Malay Peninsular prior to the British rule.⁸⁰⁶ Under the Islamic teachings, privacy of a person has its normative justification associated with human dignity, which is an interest essential to life.⁸⁰⁷ If this interest is disregarded it may lead to the collapse of social order in society. However, no specific remedy is provided under the teaching if someone invades the privacy of others other than being a

⁸⁰⁴ Human Rights and Good Governance, Opening Address at the Malaysian Human Rights Day 2004 Conference. http://www.suhakam.org.my/en/press_room/details.asp?id=163

⁸⁰⁵ There is a Malay proverb describes such an abhorrence ‘*Jangan jaga ditepi kain orang*’ which is equivalent to the English ‘mind your own business’.

⁸⁰⁶ Ibrahim, A. and Joned, A. (1987) *The Malaysian Legal System*. Kuala Lumpur, 54-55.

⁸⁰⁷ Kamali, M. H. (1998) *Freedom of Expression in Islam*. Kuala Lumpur, 22-3.

despicable and a sinful conduct. Thus, it could be said that the interest of privacy in Malay society is informed by local culture as well as divine moral principles.

Though Malay culture takes privacy seriously, it does not mean that legal protection is unnecessary. There are departures from the expected moral standard that could be appropriately addressed by the law. These departures are among the focus of the next discussion.

5.2 STATUTORY PROTECTION OF PRIVACY INTEREST

Generally, there is no specific protection of right of privacy in Malaysia. This is similar to the position of privacy in the UK. The lack of protection may be due to the absence of a legal right of privacy and the value of privacy in the society. Even though there is no freestanding right of privacy in the Constitution, protection of privacy and privacy-related interests can be inferred from various legislative provisions. In this context, privacy is considered as a peripheral interest in the legal protection scheme. Therefore, it could be said that the protection accorded to privacy is piecemeal, incomplete and indirect. This state of affairs is similar to the UK except that right of privacy in the UK is recognised through the incorporation of the ECHR rights in the Human Rights Act 1998. Furthermore, there is a limited protection of privacy afforded by the courts in the UK in relation to informational privacy. This is possible through the expansion of the existing legal framework particularly the principle of breach of confidence.

Discussion on the protection of privacy in Malaysia may be made in accordance to the nature of privacy. For the purpose of this discussion, privacy is categorised into a personal zone of privacy or non-informational and informational privacy. Some protections are given to the personal zone of privacy and others are in relation to informational privacy.

Unfortunately, a legal authority to support the existence of right of privacy in Malaysia is unavailable. Perhaps this is due to the absence of privacy as a guaranteed constitutional right that could provide a separate cause of action and remedy. However, privacy as an interest is not totally an alien concept in the domestic legal landscape. The application of

the common law system, inherited from the British system, enables limited protection to privacy-related interests under certain legal principles such as defamation, nuisance, harassment and trespass. Nevertheless, there is a possibility for privacy to gain recognition under the constitutional framework considering the attitude of the courts in adopting a liberal approach in relation to fundamental rights. It is to this liberal approach that we now turn to.

5.3 ARTICLE 5 OF THE CONSTITUTION AND LIBERAL APPROACH

There is no express provision on right of privacy in the Malaysian constitution. However, Article 5 (1) could provide the constitutional recognition for privacy. The article provides:

No person shall be deprived of his life or personal liberty, save in accordance with law.

There are two limbs in the provision, namely right to life and personal liberty. Both rights encompass privacy interest, but are distinct from each other, in the sense of a right to be let alone. Traditionally, the expression of life has been interpreted narrowly. A shift from a narrow to a broad and liberal meaning occurs when the Court of Appeal in *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*⁸⁰⁸ explained that the term ‘life’ is a wide concept, something more than a mere minimal existence.⁸⁰⁹ In this regard, Gopal Sri Ram JCA said:

I have reached the conclusion that the expression ‘life’ appearing in Article 5 (1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters that go to form the quality of life.⁸¹⁰

The liberal approach in this discussion relates to adjudication. The approach attaches importance to the individual’s interests and perceives rights as acquiring high

⁸⁰⁸ [1996] 1 MLJ 261.

⁸⁰⁹ See *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.

⁸¹⁰ *Ibid*, 288.

exclusionary force. Though the approach would seem reluctant to accept public interest oriented arguments, nonetheless, the existence of harm or imminent danger would allow rights to be overridden. In this regard, the application of a liberal approach widens the horizon of right to life particularly in connection with the meaning of 'life' in Article 5 (1) of the constitution.

The scope of fundamental liberties is expanded in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan*.⁸¹¹ This is so when the court said that the right to livelihood is one of the fundamental liberties guaranteed under Part II of the Federal Constitution. A similar approach was adopted by the court in *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal*.⁸¹² Gopal Sri Ram JCA in this case acknowledged that the term 'life' covers a person's reputation.⁸¹³ A reputation is acknowledged as an interest associated with a normative value of human dignity that forms the basis for protection. Thus, it may be argued that deprivation of reputation would amount to deprivation of 'life' within Article 5 (1) of the Federal Constitution. Therefore, it is the right of every person in Malaysia to live with common human dignity. In addition, the court also affirmed that the right to life is the most precious value of human right. As such, the right should be interpreted in a broad and expansive spirit so as to fill it with significance and vitality by enhancing the dignity of the individual and the worth of the human person.⁸¹⁴ In expanding the scope of the right to life the court said that it 'includes the right to live with human dignity and all that goes along with it namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.'⁸¹⁵ Thus, the judicial expansion of the meaning of 'life' under the Constitution is wide enough to cover privacy as an aspect of human dignity.

⁸¹¹ [1996] 1 MLJ 481, 510.

⁸¹² [2000] 3 MLJ 281.

⁸¹³ Ibid, 296.

⁸¹⁴ The court referred to two Indian authorities in extending the meaning of life in article 5 (1), *Francis Coralie v Union of India* AIR 1981 SC 746 and *Board of Trustees of the Port of Bombay v Dilipkumar* AIR 1983 SC 114.

⁸¹⁵ Per Bhagwati J in *Francis Coralie v Union of India* AIR 1981 SC 756, 753. Quoted by Gopal Sri Ram JCA in *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281.

Even though the cases may have shed some light on the possibility of the term 'life' to include privacy to preserve and enhance the quality of life, there is yet a case law before the courts where it can be pronounced decisively. Research through Malaysian legal reports found only one case, *Public Prosecutor v Haji Kassim*,⁸¹⁶ where an invasion of privacy was mentioned in the context of Article 5 (1). Unfortunately, the court in that case did not deliberate on the point because the real issue was an admissibility of evidence. Nevertheless, support on right of privacy comes from extra-judicial recognition when Gopal Sri Ram CJ, in delivering his keynote address at the Joint Seminar between the Industrial Court Malaysia Chairmen and the Bar Council Industrial Court Practice Committee, argued that the right of privacy is a facet of the concept of life that is protected by Article 5 (1).⁸¹⁷ The acknowledgment from a member of the bench is a promising prospect taking into consideration the wide scope of restrictions on fundamental rights. This could inspire a change in attitude as the context in which law operates changes. So too may the protection given by law. As basic economic needs are met, Malaysian society can devote more attention to privacy as an aspect of fundamental right in a democratic society.

Judicial activism as shown by the courts through their willingness to depart from the traditional approach to a liberal and purposive approach may be a turning point for privacy interest becoming part of the human rights issue in the constitutional scheme. This is parallel with the attitude that the courts should adopt by keeping in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution. This is expressed by Raja Azlan Shah in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus*⁸¹⁸ when he said that 'The Constitution is a living piece of legislation and that should be interpreted with less rigidity and more generosity than other acts'. Therefore, a constitutional provision should be construed 'in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilised but remains flexible enough to meet the newly emerging problems

⁸¹⁶ [1971] 2 MLJ 114.

⁸¹⁷ [2001] 4 MLJA 81.

⁸¹⁸ [1981] 1 MLJ 29, 32.

and challenges applies with greater force in relation to a fundamental right enacted by the Constitution.⁸¹⁹ On the basis of such an approach, it may be argued that the expansion of the scope of Article 5 (1) provides an opportunity for privacy to be introduced implicitly by the courts.

On the other hand, although the courts have the power to extend the interpretation of the right of life as a fundamental right,⁸²⁰ it is doubtful whether the courts are willing to pronounce the existence of the right of privacy. This is because of the uncertainty in the judicial approach in relation to the fundamental rights matter.⁸²¹ Arguably, the courts are inconsistent in applying a liberal and purposive approach in relation to fundamental rights.⁸²² Moreover, the impact of including privacy under the meaning of life could impose a positive obligation on the government's part to ensure the citizens their right of privacy. This could amount to meddling into the domain of the legislature and the executive, which the courts in Malaysia are not prepared to indulge. The role of the courts is to interpret the laws and whenever necessary to give effect to the purpose or object of the laws as enacted by the legislatures.⁸²³

The right of personal liberty under Article 5 (1) may also protect the interest of privacy in a limited sense. Personal liberty refers to rights relating to or concerning the person or body of the individual.⁸²⁴ The courts have given a narrow interpretation to personal liberty. The Federal Court in *Government of Malaysia & Ors v Loh Wai Kong*⁸²⁵ affirms this when Suffian LP said that:

⁸¹⁹ Per Bhagwati J in *Francis Coralie v Union of India* AIR 1981 SC 756, 752.

⁸²⁰ Article 128 (2) of the Federal Constitution empowers the Federal Court with a jurisdiction to determine a question arises as to the effect of any provision of the Constitution.

⁸²¹ Faruqi, S. Free Speech and the Constitution. (1992) 4 CLJ lxiv, lxxiii.

⁸²² See *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72. See also *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33, *Public Prosecutor v Datuk Harun bin Idris* [1977] 1 MLJ 180, *Jabar v Public Prosecutor* [1995] and *Kekatong Sdn Bhd v Danaharta* [2003] 3 MLJ 1.

⁸²³ See per Haidar CJ in *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v Shaik Zolkaffily Bin Shaik Natar & Ors* [2003] 3 MLJ 705, 715.

⁸²⁴ Dicey argued that the essence of personal liberty is free from any physical restraint or coercion. See Dicey, A. *The Introduction of Constitutional Law*, 207.

⁸²⁵ [1979] 2 MLJ 33. The court agreed with the interpretation given by the Indian court in *Gopalan* AIR 1950 SC 27 that personal liberty is the antithesis of physical restraint or coercion.

we are convinced that the article only guarantees a person, citizen or otherwise, except an enemy alien, freedom from being "unlawfully detained"; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and be defended by his own lawyer; the right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority. It will be observed that these are all rights relating to the person or body of the individual.⁸²⁶

Personal liberty in Article 5 (1) does not include all facets deemed to be an integral part of life and those matters that form the quality of life. This is emphasised by the court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*⁸²⁷ when it rejected the approach that personal liberty in this regard should be generously interpreted to cover the aspect of life. Even with the strict interpretation of personal liberty, it could be argued that a person in Malaysia has the right to enjoy the privacy of his person from unlawful interference. However, the right is not absolute because it can be encroached 'in accordance with the law'.⁸²⁸

Although there is no deliberation on privacy by the courts in the context of Article 5 (1), the interest it protects may include privacy in a limited sense, which is confined to a personal zone of privacy. This is so when personal liberty is confined to the person or body of an individual. On this premise, there is a constitutional issue in relation to right to be let alone when a group of pupils were subjected to body search for the purpose of detecting tattoos.⁸²⁹ It may be argued that the act of searching for tattoos is unlawful as there is no legal provision empowering the authority to conduct body search for that purpose. This is a clear invasion of privacy that could invoke Article 5 (1) in relation to personal liberty. It is therefore suggested that the liberal and expansive approach exercised by the court in *Utra Badi* case be extended to privacy related issue.

In the absence of an explicit constitutional right of privacy, reliance on other related causes of actions as the basis to establish privacy interest is required. This indirect

⁸²⁶ Ibid, 34-5.

⁸²⁷ [2002] 3 MLJ 72.

⁸²⁸ Article 5 (1) '...save in accordance with law.'

⁸²⁹ Malaysian pupils strip-searched in satanic cult crackdown.
http://www.ananova.com/news/story/sm_362924.html

approach of protecting privacy has its own set back as it depends on the willingness of the courts to construe the relevant provision in order to give recognition to privacy. It may be too optimistic to assume that a positive development in this area is on the way, considering the reluctant attitude of the courts.⁸³⁰ Although the constitutional provisions should be construed with less rigidity and more generosity than ordinary statutes, this does not mean that the courts are at a liberty to stretch or pervert the language of the Constitution.⁸³¹

Arguably, if personal reputation can be accepted as part of a privacy interest, then on such a basis it could be argued that protection of privacy interest already exists under the constitutional scheme. Article 10 (2) (a) could afford support in contending that defamation is recognised as an interest that may restrict freedom of speech and expression. In other words, protecting the reputation of a person is more important in some circumstances than allowing the freedom of speech and expression. On this premise, it is inconceivable if a constitutional protection covers personal reputation but fail to extend to personal privacy.

Alternatively, privacy may be included under the protection of morality as provided by Article 10 (2) (a) of the Constitution. The provision explicitly permits reliance on morality as a ground to restrict freedom of expression. However, to include privacy under the provision of morality could be difficult when the latter is given restrictive meaning. The word 'morality' which appears in Article 10 (2) (a) and Article 11 (5) is referred to public morality and not private.⁸³² The court in *Nordin Bin Salleh v Dewan Undangan Negeri Kelantan*,⁸³³ followed the interpretation in an Indian case of *Mian Bashir v State of Jammu and Kashmir*,⁸³⁴ which ruled that the word morality in Article 10 (2) (a) confined to sexual morality and not political morality. In addition, reliance on morality as a ground to develop privacy within the constitutional scheme is fraught with difficulty. This could be anticipated since Malaysia practices dual legal system where

⁸³⁰ Bari, A. Teaching Constitutional Law in Malaysia: An Appraisal. (1999) 1 *MLJ* clxvii, clxxiv.

⁸³¹ *Merdeka University Bhd v Government of Malaysia* [1981] 2 *MLJ* 356.

⁸³² *Halimatussaadiah v Public Service Commission, Malaysia & Anor* [1992] 1 *MLJ* 513, 525.

⁸³³ [1992] 1 *MLJ* 343, 358.

⁸³⁴ AIR 1982.

Islamic law is part and parcel of the Malaysian legal system. The main difficulty would be in relation to the acceptable interpretation of morality and its application to Malaysians, Muslims and non-Muslims. For instance, a close proximity relationship between unmarried couple is considered as an immoral behavior under the Islamic teaching but may not be so in a secular society.

5.4 PRIVACY UNDER THE RIGHT TO PROPERTY

Another constitutional provision, which has an implicit effect on privacy interest, is right to property under Article 13 (1). The article provides that:

No person shall be deprived of property save in accordance with law.

The proprietary right, though considered as one of the hallmark of democracy,⁸³⁵ is not absolute and unqualified. The same provision allows for deprivation of the right that is legally executed according to the law. The right enables a proprietor to have exclusive enjoyment of a property against any unlawful interference. In this regard the privacy of the proprietor is safeguarded against unlawful act such as trespass or nuisance.

There is implicit protection of personal privacy in proprietary right under section 44 (1) (a) of the National Land Code, which provides:

Subject to the provisions of this Act and of any other written law for the time being in force, any person or body to whom (under this Act or a previous land law) land has been alienated, reserved land has been leased or temporary occupation license (including a license so styled under a previous land law) has been granted in respect of any land, shall be entitled to:

(a) the exclusive use and enjoyment of so much of the column of airspace above the surface of the land, and so much of the land below that surface, as is reasonably necessary to the lawful use and enjoyment of the land;

Thus, the exclusive use and enjoyment of land and airspace is a privacy interest. For instance, the court in *Chen Yue Kiew (F) v Angkasamas Sdn Bhd*⁸³⁶ found that a land

⁸³⁵ Jain, M. P. and Xavier, G. *Compulsory Acquisition of Land in Malaysia* (Pt I) (1996) 2 MLJA 29.

⁸³⁶ [2003] 4 MLJ 365. See also *Karuppannan v, Balakrishnen (Chong Lee Chin & Ors, third parties)* [1994] 3 MLJ 584, 584.

owner is entitled to an exclusive use of his land and the air space above the land. The court would not hesitate to grant a perpetual injunction against anyone trespassing into the land of another or into the air space above it. Similarly, in the UK, the court in *Baron Bernstein of Leigh v Skyviews and General Ltd*⁸³⁷ faced with the problem of balancing the right of an owner to enjoy the use of his land against the rights of the general public. In this case the plaintiff's land was flown over and an aerial photograph of his house taken without his knowledge and consent. The plaintiff sued the defendant for trespassing and invasion of privacy. The court held that a landowner's rights in the air space above his property are not extended to an unlimited height. The court also held that the act of taking a photograph from the air space above the ordinary use and enjoyment is not unlawful. However, Griffiths J attributed the act as 'monstrous invasion privacy.'

Exclusive enjoyment of property is also an issue in *K Mahunaran v Osmond Chiang Siang Kuan*.⁸³⁸ In this case, the plaintiff and the defendant were owners of two premises respectively. The two premises comprised of double-storey terrace houses separated by a common party wall. The defendant concreted the common party wall at the front portion of the premises without the consent of the plaintiff. The plaintiff applied for an order for the defendant to pull down and remove the wall put up by him and restores the same to its original position or as closely akin thereto. The plaintiff also alleged that the said construction had impeded and affected his light, ventilation and view. The court decided that the defendant had committed an act of trespass by demolishing the original party wall and building a new party wall.

The above-mentioned cases show that legal protection on privacy-related interest is available in Malaysia. Apparently, privacy is the crux in protecting the right to property. However, the legal protection is not accorded to privacy *per se*. This establishes the fact that protection of privacy interest in Malaysia is indirect and piecemeal.

⁸³⁷ [1978] QB 479.

⁸³⁸ [1996] 5 MLJ 293.

5.5 PRIVACY INTEREST AND LEGISLATION

Despite the implicit constitutional provisions on privacy interest, there are several ordinary statutory provisions that explicitly include privacy as an element in protecting other main interest. For instance, section 509 of the Penal Code criminalises words or gestures intended to insult the modesty of a person. The section provides:

Whoever, intending to insult the modesty of any person, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such person, or intrudes upon the privacy of such person, shall be punished with imprisonment for a term which may extend to five years, or with fine, or with both.

Obviously, the main interest in the provision is with regard to the modesty of a person. In this regard, intrusion of privacy alone does not amount to an offence. The provision can only be invoked if an act of intrusion is intended to insult the modesty of a person.⁸³⁹

Another relevant provision implicitly dealing with privacy is section 29b (4) of the Moneylenders Act 1951. Again, privacy is not the main interest in the protection scheme. The law provides:

For the purposes of subsection (1), the doing of an act of harassment or intimidation upon another person includes the making of statements, sounds or gestures, or exhibiting of any object intending that such word or sound shall be heard or that such person shall see such gesture or object or intruding upon the privacy of such person.

The main purpose of section 29b of the Moneylenders Act is to prohibit moneylenders from harassing or intimidating the borrowers. It is considered as harassment or an intimidation if the conducts mentioned in sub section (1) and (4) intrude the privacy of

⁸³⁹ See *Kong Lai Soo v Ho Kean* [1973] 2 MLJ 150.

the borrower. Thus, the provision is not meant to protect the privacy of the borrower *per se*. Suffice to say, intrusion of privacy is an important element in order to establish the act of harassment or intimidation on the part of the moneylender.

In addition, Child Act 2001 does provide protection of privacy of a child under eighteen years old. Section 15 of the Act imposes restriction on the media from reporting or publishing information regarding a child involves in the following situations:

- (a) any step taken against a child concerned or purportedly concerned in any criminal act or omission, be it at the pre-trial, trial or post-trial stage;
- (b) any child in respect of whom custody is taken under Part V (Children in need of care and protection)
- (c) any child in respect of whom any of the offences specified in the First Schedule has been or is suspected to have been committed; or
- (d) any proceedings under Part VI (Children in need of protection and rehabilitation).⁸⁴⁰

In addition, section 15 (1) prohibits the media from revealing the name, address, educational institution, or any particulars calculated to lead to the identification of the child. The identity of a child cannot be disclosed due to his involvement either as being the person against or in respect of whom action is taken or as being a witness to the action.⁸⁴¹ However, such a prohibition can be dispensed with if the Court for Children is satisfied that it is in the interest of justice to do so and in the case of an application by or with the authority of a protector.⁸⁴²

The protection of the privacy of a child under section 15 emphasises on the need to protect the interest of children. Admittedly, the prohibition against publication by the press poses a chilling effect on the freedom of the press. Since press freedom is not an absolute right, the freedom can be overridden by the interest of children, which is

⁸⁴⁰ Section 15 (1) of the Child Act 2001.

⁸⁴¹ *Op cit* section 15 (2).

⁸⁴² *Ibid*.

regarded as important particularly in protecting their welfare and upbringing.⁸⁴³ Apparently, the restriction imposed by the Act on press freedom to publish is deemed to be necessary and expedient under the provision of Article 10 (2) (a) of the Constitution. Thus, the courts have no power to question the legality of the restrictions. In relation to this, it is uncertain whether the conduct of the journalists disclosing the identity of three girls, aged fourteen, who had lodged a police report alleging they had been raped by their acquaintances, can be caught under the provision of section 15 (1) and (2) of the Act.⁸⁴⁴ It could be argued that if the stage of pre-trial in section 15 (2) (a) covers the act of making a police report, then the journalists may have committed an offence under the Act pursuant to section 15 (4) of the Act. The section provides:

Any person who contravenes subsection (1) or (2) commits an offence and shall on conviction be liable to a fine not exceeding ten thousand *ringgit* or to imprisonment for a term not exceeding five years or to both.

Unlike in the UK where freedom of expression is weighted heavily, the privacy of a child is not a ground that always overrides the right under Article 10 of the Convention. Privacy of a child is paramount only when there is an issue of upbringing, which the 'paramount principle' under section 1 (1) of the Children Act 1998 applies.⁸⁴⁵ The child's welfare relating to upbringing automatically prevails over the rights of other parties. Freedom of expression acquires a primacy status in *In the matter of X (a Child)*.⁸⁴⁶ In considering section 12 (4) of the HRA and Article 10 of the Convention, the court ruled that 'this is not a balancing exercise in which the scales are evenly positioned at the commencement of the exercise. On the contrary, the scales are weighted at the beginning so that Article 10 prevails unless one of the defined derogations applies when given a narrow interpretation.'

⁸⁴³ *In re Z (A Minor) (Identification: Restrictions on Publication)* [1995] 4 All ER 961.

⁸⁴⁴ Ong, A. Lapse in journalistic ethics in NST, Star draws flak. *Malaysiakini*, 26 January 2004 <http://www.malaysiakini.com/news/2004012600113808.php>. 'Protect our children'? Certain media don't! <http://www.jefffoo.com/archives/001523.php>

⁸⁴⁵ The section provides 'When a court determines any question with respect to upbringing of a child or the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.'

⁸⁴⁶ [2001] 1 FCR 541.

The progress in the economic and commercial sector in Malaysia has an impact on privacy-related interests. In order to be engaged in credible and safe commercial transactions, informational privacy needs to be safeguarded. In pursuant to this development, Malaysia has enacted a few cyber laws such as Digital Signature Act 1997, Telemedicine Act 1997 and proposed a Personal Data Protection Bill. These legislative instruments consider privacy as an important interest to necessitate legal protections.⁸⁴⁷ These laws are part of the legal infrastructure in regulating information and communication through cyber space. The purpose of these cyber laws is to provide legal infrastructures and facilitate the growth of multimedia industry and electronic commerce in Malaysia.⁸⁴⁸

The Digital Signature Act 1997 lays the framework for electronic commerce by legalizing digital signatures for the purpose of business transactions. The interest of the government and business industries in digital signature technology is expanding mainly because electronic communication has become widespread. Digital signatures are needed for electronic commerce and communication so that electronic transactions can be executed with confidence. Section 72 (1) of the Act provides for obligation of secrecy. The section provides:

Except for the purposes of this Act, no person who has access to any record, book, register, correspondence, information, document or other material obtained under this Act shall disclose such record, book, register, correspondence, information, document or other material to any other person.

This provision safeguards personal information against disclosure. As such it also protects privacy interest in individual's personal information. But it is unsaved in case of impersonation of identity occurs by way of unauthorised use of private key⁸⁴⁹ or computer

⁸⁴⁷ Other laws include under the cyber law scheme are the Communication and Multimedia Act 1998 and Computer Crimes Act 1997.

⁸⁴⁸ Zainol, Z. A. Electronic Commerce: A Comparative Analysis of the Malaysia Digital Signature Act 1997 and the Singapore Electronic Transaction Act 1998. Paper presented at the 15th BILETA Conference. University of Warwick, Coventry, England. <http://www.bileta.ac.uk/00papers/zainol/html>

⁸⁴⁹ Section 2 of the Act interpret privacy key as the key of a key pair used to create a digital signature.

hacking. This will enable the impersonator to gain access and retrieve any information on the certified screen.

Similarly, Telemedicine Act 1997 contains provisions that to a certain extent protect informational privacy of the patient. According to section 2 of the Act, telemedicine means ‘the practice of medicine using audio, visual and data communications.’ Section 5 (1) of the Act provides:

Before a fully registered medical practitioner practices telemedicine in relation to a patient, the fully registered medical practitioner shall obtain the written consent of the patient.

The consent given by the patient is not valid unless the practitioner informs the patient that any information obtained or disclosed in practicing the telemedicine interaction is protected by confidentiality. The consent also is invalid if the practitioner fails to inform the patient regarding sub section (2) (d), which provides:

That any image or information communicate or used during or resulting from telemedicine interaction which can be identified as being that of or about the patient will not be disseminated to any researcher or any other person without the consent of the patient.

The protection of information in sub section (2) (d) is a procedural matter related to the obligatory requirement to obtain the patient’s consent. The protection does not exist independently whereby action can be taken in case of intentional disclosure of information without consent. In the absence of this provision, the remedy that may be claimed by the patient could be found under different cause of action such as breach of contract or breach of confidence. The Act also does not clarify on information that needs prior consent before disclosure. It is inconceivable to assume that the Act covers all types of information related to the practicing of telemedicine.

Malaysia is in the process of finalising a personal data protection legislation that will balance consumer privacy with the preservation of national and public security. The

proposed legislation is intended to protect informational privacy of individuals and to ensure that data collectors use the data only for the purpose specified during collection. The law is part of the exercise to place Malaysia parallel to the rest of the world in providing legal protections for cyber matters, which is in co-ordination with the ongoing development of the Multimedia Super Corridor (MSC).⁸⁵⁰ According to the former Energy, Communications and Multimedia Minister Datuk Amar Leo Moggie, a personal data protection law would enhance privacy rights, but "it is also important to recognise that individual privacy rights are never absolute."⁸⁵¹

Privacy is the core interest, which form part of the main features in the proposed Personal Data Protection Bill. It will provide legal protections for personal data to ensure secrecy and integrity in the collection, processing and utilisation of data transmitted through the electronic network. The proposed law is an effort to make Malaysia attractive for commercial transaction purposes by providing legal protection to data commodity. The Ministry is looking at the Organization for Economic Co-operation and Development (OECD) guidelines, European Union Data Directive and the United Kingdom, Hong Kong and New Zealand legislation as models for the proposed Act.

The Bill aims to regulate the collection, possession, processing and use of personal data by any person/organisation, including the government, so as to provide protection to an individual's personal data and safeguard the individual's privacy. The legislation will also establish a set of common rules and guidelines on the handling and treatment of personal data by any person/organisation. Personal facts, which are disseminated, must be 'private' in order to pursue a cause of action for invasion of privacy. It may be contended that an individual's facts, which are contained in commercial databases, although personal in a literal sense, are not private in a legal capacity. This is because there is no legitimate expectation of privacy as to those facts. The stated objectives of the Bill are:

- (i) To provide adequate security and privacy in handling personal information;

⁸⁵⁰ Ministry of Energy, Water and Communications, Personal Data Protection.
<http://www.ktkm.gov.my/template01.asp?>

⁸⁵¹ Sharif, R. Data protection law to balance private, public interest. *The Star*, 29 October 2001.

- (ii) To create confidence among consumers and users of both networked and non-networked industries;
- (iii) To accelerate uptake of e-transactions;
- (iv) To promote a secure electronic environment in line with Multimedia Super Corridor objectives.

The willingness of the government to introduce law that provides protection to informational privacy reflects a strengthening commitment to privacy. It is a positive development as far as right of privacy is concerned in Malaysia. Until such a right is firmly established within a constitutional scheme through either the legislature or judiciary, Malaysians have to rely on the existing insufficient protection of privacy that is a by-product of other interests. Despite the fact that the proposed law will introduce an aspect of informational privacy, the recognition of privacy by the courts as fundamental human rights remains to be seen.

In addition, the existence of the Communications and Multimedia Act 1998 provides protection on telecommunications privacy. For instance, Section 234 of the Act prohibits unlawful interception of communications and unlawful disclosure of authorised interception. In practice, provisions in the Communications & Multimedia Act 1998 restricting telecommunications interception can be ignored or overridden by the Internal Security Act 1960 and the Computer Crime Act of 1997.

The emphasis on privacy as an individual right in Malaysia is propelled by political and economic reasons. It is influenced by the aspiration of the government to transform the country into becoming a developed country by the year 2020. This is reflected in the Vision 2020 master plan. The creation of Multimedia Super Corridor (MSC) is a step toward the realisation of the aspiration. In achieving this goal the government pledges to ensure free flow of information on the internet by companies accredited with MSC status. This assurance is seen as a double standard because it applies only to those companies with MSC status. However, scepticism is looming as to whether this assurance can be maintained when the police detained four people under the Internal Security Act 1960 on

suspicion of spreading rumors of disturbances in Kuala Lumpur in August 1998. The police tracked their activities on the Internet with the assistance of the main internet service provider *Mimos Berhad*. Control on news and information on the internet is also exercised when the police raided the operating office of an independent online press, *Malaysiakini*, and confiscated computers on the ground of alleged seditious article published by the press. These instances illustrate that the constitutional blessing of necessity and expediency perpetuates the employment of institutional mechanism in restricting free expression.

There is a dilemma between the need for internet regulation and economic development of the country. Given the emphasis by the Malaysian government on multimedia and information technology and the policy of encouraging investors, it is unlikely that strict regulations will be employed in this area. To do so would be a disincentive for interested companies to join the MSC scheme. The aspiration of making Malaysia as a hub country in the area of information technology particularly in Asian region requires adequate infrastructures in terms of physical development as well as legal protections. Needless to say, unprecedented advances in information technology make it possible for strangers to invade electronically into another person's life. It allows corporations and the government to accumulate vast stores of personal information in databases. Fear of disclosures of this kind of information has enhanced the acceptability of permitting the government and the courts to control the flow of information regarding citizens. Consequently, the right of privacy emerges as one of the highly valued right in a society, which reflects the profound importance of this fundamental interest in a modern society.

The protection of privacy in the cyber arena is the result of the government's commitment to develop the sector of information technology in pursuing the goal of being a developed country by 2020. On this premise, it could be argued that protection of privacy is for economic purposes in information and communication technology rather than the prominence of the conceptual foundation of the right in a democratic society.⁸⁵² In this sense, protection of privacy is characterised as a cost of doing business rather than

⁸⁵² Privacy is a matter of balance rather than human right. See Azmi, I. E-Commerce and Privacy Issues: An Analysis of the Personal Data Protection Bill. (2002) *16 IRLCT*, 326.

ensuring a public good.⁸⁵³ Nevertheless, it serves as a catalyst in promoting privacy as a valued interest that requires protection not only from the information technology perspective but also most importantly as a personal right of individuals.

5.6 COMMON LAW PROTECTIONS OF PRIVACY INTEREST

Historically, the common law principles were introduced into Malay Peninsular during the British colonial period. The law was administered through the British judicial system and it became part of the domestic legal system.⁸⁵⁴ The application of the common law is by virtue of Article 160 (2) of the Federal Constitution, which interprets the word 'law' as:

Written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

In *MBF Holdings Bhd & Anor v Houng Hai Kong & Ors*⁸⁵⁵ the defendants argued that 'existing laws' in Article 162 of the Constitution do not include the common law of England. It was argued in this case that the application of the common law of England is merely an application of precedent in the process of judicial decision making. Thus, the common law rules are to be regarded as valid for that purpose only. However, the court did not agree with the learned counsel's interpretation of Article 162. The court said that the common law is not a mere precedent for the purposes of making a judicial decision. Instead, the common law is a substantive law that has the same force and effect as written law. It has been accepted in this country (Malaysia) and is recognised as a binding authority. It is therefore, untrue to say that under Article 162 the common law has ceased to exist in Malaysia.

⁸⁵³ At a conference in April 2000, Deputy Prime Minister Datuk Seri Abdullah Ahmad Badawi stressed the role of the private sector in creating a safe and private environment in which electronic commerce could flourish. In likening on-line privacy protection to the steps banks had to take to make ATMs safe, the Deputy Prime Minister characterized privacy safeguards as a cost of doing business rather than a public good. See Sarban Singh, Match our commitment, DPM tells private firms. *The New Straits Time*, 19 April, 2000.

⁸⁵⁴ Ibrahim, A. and Jones, A. (1987) *The Malaysian Legal System*. Kuala Lumpur, 75.

⁸⁵⁵ [1993] 2 MLJ 516.

5.6.1 COMMON LAW UNDER SECTION 3 OF THE CIVIL LAW ACT 1956

The application of English common law principles is governed by the Civil Law Act 1956. In the absence of local statutory provision, the courts may apply the English common law and equity. Section 3 (1) of the Act imports English common law and equity on all subjects as at the cut-off date of 7 April 1956 in all the states of Malaysia. However, the acceptance of English common law and equity is subject to the proviso of that section where ‘...it shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.’ The impact of the proviso is to rule out direct application of English common law. This will allow the local common law to progress on the basis of English principles.

The effect of the cut-off date is to exclude any subsequent development in English common law.⁸⁵⁶ Hashim Yeop A Sani CJ in the Supreme Court case of *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor*⁸⁵⁷ clarifies this effect where he explained that the development of the common law after 7 April 1956 is entirely in the hands of the courts of this country. This is illustrated in the case of *Syarikat Batu Sinar Sdn Bhd & Ors v UMBC Finance Bhd & Ors*.⁸⁵⁸ In this case, Peh Swee Chin J refused to follow the decision of the English court in *Moorgate case* (1977) AC 890, on the point concerning failure to have an ownership claim registered, on the ground that the practice in West Malaysia combined with the statutory provisions of the Road Traffic Ordinance 1958 in regard to the registration of ownership claim, would constitute such a distinctive local circumstance of the local inhabitants of West Malaysia. With regard to the proviso of section 3 (1) of the Civil Law Act 1956, the judge said:

We have to develop our own common law just like what Australia has been doing by directing our minds to the 'local circumstances' or 'local inhabitants'.⁸⁵⁹

⁸⁵⁶ *Lee Kee Choong v Empat Nombor Ekor (NS) Sdn & Ors* [1976] 2 MLJ 93, 95.

⁸⁵⁷ [1990] 1 MLJ 356, 361.

⁸⁵⁸ [1990] 3 MLJ 468.

⁸⁵⁹ *Ibid*, 470.

Moreover, the court in *Attorney General, Malaysia v Manjeet Singh Dhillon*⁸⁶⁰ explained that ‘the common law... applied and decided by our courts after 7 April 1956, by virtue of the Civil Law Act 1956, has become part of our law.’ Previously, the application of the law is also made possible by way of binding precedent whereby the courts in Malaysia are bound to follow decisions made by the Privy Council. However, reference to Privy Council is abolished in 1986, which makes the decision of the Council no longer binding on the local courts but reduced to persuasive authority.

Reliance on English common law principles does not necessarily imply that the law in Malaysia remains static and does not develop.⁸⁶¹ The Malaysian judiciary is willing to draw upon common law principles and to consider decisions of other Commonwealth jurisdictions for guidance in civil as well as criminal law matters. This position is postulated in the judgment by Raja Azlan Shah in *Raja Mokhtar bin Raja Yaacob v Public Trustee, Malaysia*⁸⁶² when he concurred that the decisions of the Commonwealth courts though are not binding, should be given the highest respect.

5.6.2 COMMON LAW PRINCIPLES AND THE PROTECTION OF PRIVACY-RELATED INTERESTS

In Malaysia, common law protections are not directly accorded to privacy *per se*. Protections are mainly on the interest related to privacy, involving private facts, reputation and proprietary interest. Most of the protections are provided by principles in the area of law of tort especially trespass, nuisance, defamation and breach of confidence.

The law of trespass does not concern privacy-related interests directly. The main object of the law is to protect proprietary interests. Nevertheless, it provides an indirect protection to privacy-related interests whereby the interest in land, by way of possession, cannot be encroached. Trespass to land is a direct entry on the land of another, and is

⁸⁶⁰ [1991] 1 MLJ 167, 177-78.

⁸⁶¹ *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor* [1990] 1 MLJ 475.

⁸⁶² [1970] 2 MLJ 151, 152.

actionable *per se*, without proof of special damage. It is essentially an interference with possession of land rather than ownership.⁸⁶³

The court in *Kwong Hing Realty Sdn Bhd v Malaysia Building Society Bhd (American International Assurance Co Ltd, Third Party)*⁸⁶⁴ referred to an English text book entitled *Clerk & Lindsell on Torts (17th Ed)* for general principles regarding trespass to land. It consists of any unjustifiable intrusion by one person upon the land in the possession of another. In this case, the respondent is the registered owner of a piece of land while the adjacent lot belongs to the appellant. The appellant's predecessor-in-title had applied for permission to build side windows protruding into the respondent's land and undertook to remove them so they would not obstruct the construction of any building later on. Subsequently, the respondent, who intended to build a hotel on his land, asked the appellant to remove the protrusions, but the appellant failed to do so. The respondent also alleged trespass against the appellant for constructing a side exit, sewerage system, manholes and septic tank that encroached on his land. The court held that the law has clearly spelt out the right of an individual over his land, *inter alia*, he is given the exclusive use of the airspace above the surface of his land. Therefore, the appellant had no legal right to encroach into the airspace of the land unless the respondent allowed it.

Similarly, the court in *Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor*⁸⁶⁵ referred to English case in *Robert Addie & Sons (Collieries) Ltd v Dumbreck*⁸⁶⁶ particularly on the meaning of trespasser. In this case, the plaintiff alleged that the defendants had trespassed and constructed buildings on his land. The court decided that in law, a trespasser is one who wrongfully enters on land in the possession of another, and has neither the right nor permission to be on the land. That was a fitting description of the defendants and they had not satisfied the court that there was a fair or reasonable probability of them having a real or *bona fide* defence. The plaintiff is therefore entitled

⁸⁶³ *Yip Shou Shan v Sin Heap Lee-Marubeni Sdn Bhd* [2002] 5 MLJ 113. See also *Karuppannan v Balakrishnen (Chong Lee Chin & Ors, Third Parties)* [1994] 3 MLJ 584 and *Julaika Bivi v Mydin* [1961] MLJ 310.

⁸⁶⁴ [1997] 5 MLJ 670.

⁸⁶⁵ [1994] 3 MLJ 530. See also *Mohamed Said v Fatimah* [1962] 1 MLJ 328 in which the court referred to *Thompson v Ward* [1953] 2 QB, 159 per Evershed MR with regard to possession of land.

⁸⁶⁶ [1929] AC 358, 371.

to recover damages in trespass even though he has sustained no actual loss. In defining who is a trespasser, the court followed Lord Dunedin's description that a trespasser is one who wrongfully enters on land in the possession of another, and has neither the right nor permission to be on the land.

The indirect protection of privacy under trespass can also be found in nuisance. Nuisance is another area of common law, which is basically a substantial interference in the right to enjoy property. Protection of the right is available only to the complainant who has an interest in the land. It may thus be noted that exclusive enjoyment of land is the main interest that the law seeks to protect.

In Malaysia, the law of nuisance as developed by the English courts has been followed. This is exercised by the court in *Seong Fatt v Dunlop Malaysia Industries Sdn Bhd*.⁸⁶⁷ In this case the court held that the continuous fall of water from one land to the other land which caused a considerable damage was a nuisance. In another case, *Azman Bin Mohd Yussof & Ors v Vasaga Sdn Bhd*,⁸⁶⁸ the plaintiff applied for an injunction to restrain the defendant from operating a disco and pub business on the grounds that the business disturbed their peace, tranquility and safety. The plaintiff argued that the loud music from the premise caused vibration to the building and others. The court held that interference with the enjoyment of property includes making unreasonable noises or vibration. In arriving at the decision, the court referred to *Halsey v Esso Petroleum Co Ltd*⁸⁶⁹ that held that loud noises and vibration 'interferes with one's enjoyment, one's quiet, one's personal freedom, and anything that discomposes or injuriously affects the senses or the nerves'. Apparently, the existing common law principles afford protection to privacy indirectly. However, there are other areas of law that works to protect privacy-related interests more directly such as defamation and breach of confidence.

The law of defamation is about giving protection to a person from being disrepute. It seeks to protect a person's dignity and honor. In any action for defamation whether for libel or slander, the plaintiff must prove that the matter complained of: (i) is defamatory

⁸⁶⁷ [1984] 1 MLJ 286.

⁸⁶⁸ [2001] 6 MLJ 217.

⁸⁶⁹ (1961) 1 WLR 683.

(defamation) (ii) refers to the plaintiff (identification) (iii) has been published to a third person (publication).

It does not mean that every publication that caused a person to be ridiculed by right-thinking members of the public or to lower him in their estimation would result in liability for defamation. If the fact that was published were true, then it would serve as a complete defence. This makes the law of defamation unsuitable for protection of privacy because invasion of privacy is mainly about publication of true personal information. In addition, if the comment is an honest comment made based on facts, then there would be a qualified defense. Hence, defamation strikes at the core interest in privacy, which is a person's dignity. The tort involves injury not to an individual *per se*, but rather to an individual's reputation as perceived by others in that individual's community.

Should the press not be considered differently since the press has a role to play in providing the public with information? Apparently, the importance of the press does not relinquish them from legal responsibilities. Moreover, Article 8 (1) of the Constitution provides for equality under the law. The effect of the provision is that the press in Malaysia is under the same rule of law as applicable to the rest of the citizens. The issue of a distinct status of the press was raised in *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd*.⁸⁷⁰ The court refused to accord the press any special status in considering the existence of a duty to publish a matter of public interest. Richard Malanjum J. explained:

A matter of public interest does not necessarily entitle anyone to assume a duty to communicate it to others especially if any statement related to that matter may be libellous. Further, journalists, editors and newspapers do not have any special positions so as to entitle them to rely on the defence of qualified privilege on any matters which they may publish.⁸⁷¹

Protection of privacy in Malaysia could also be considered in the context of trade secrets and confidential information. Protection of trade secrets and confidential information are

⁸⁷⁰ [1996] 1 MLJ 393.

⁸⁷¹ Ibid, 411.

based on common law principle of breach of confidence. Primarily, breach of confidence seeks to protect property right rather than the interest of privacy. With regard to this, the law protects confidential information relating to business or trade secrets. Currently, Malaysia adopts the common law principles of confidentiality as applied by the UK courts. An action for breach of confidence is not limited to circumstances where there is a contractual relationship. The scope of the law is widened when the courts recognised that breach of confidence as one of the actions in tort. One of the issues in *Schmidt Scientific Sdn Bhd v Ong Han Suan*⁸⁷² was whether there is an action in tort for breach of confidence. This case involved a disclosure of confidential information and trade secrets of ex-employer. The court took into account the view expressed by Lord Denning MR in *Seager v Copydex Ltd*⁸⁷³ in which equity would interfere to prevent those receiving information in confidence from taking unfair advantage of it and decided that a breach of confidence should also be regarded as a tort with damages to be awarded to the successful plaintiff.

The extension of the law from the law of contract to tort paves the way for privacy to be given protection by the court. The possibility of privacy to receive protection is promising when the court in *Electro CAD Australia Pty Ltd & Ors v Mejati RCS Sdn Bhd & Ors*⁸⁷⁴ extends the meaning of confidential information to include literary and artistic secrets, personal secrets and, public and government secrets. Although the scope of information is extended, the main interest under the law still relates to property right. In this regard, the court remarked that:

Due to the rapid and highly volatile revolution in technology and with the concept and subsequent incept of the Multi Media Super Corridor, the courts must take a broader view of the meaning of property and include information as such.⁸⁷⁵

In this case, the High Court addressed the problems ensued when a director of one company leaves and sets up a business in competition with his former company. The director in question had been a director of a company set up in Malaysia to market a car

⁸⁷² [1997] 5 MLJ 632.

⁸⁷³ (1967) 2 All ER 416.

⁸⁷⁴ [1998] 3 MLJ 422.

⁸⁷⁵ Ibid, 451.

theft prevention device that had been developed in Australia. It is also worth noting that the judge rejected an argument by the defendants that no confidential information had been appropriated by them in their design because the plaintiffs had abandoned a patent application for their design which showed that it was not inventive and therefore could not rise to the level of a protected trade secret. The judge stated:

To my mind it is necessary to note that a claim to confidential information does not mean that the information must pass the patent test. It is only necessary to show that the information is confidential and cannot be found in the public domain.⁸⁷⁶

The defendants contended that the information imparted prior to the execution of the confidentiality agreement was not imparted under any obligation of confidence. The court held that the information, although imparted before the execution of the confidentiality agreement, was indeed imparted under an obligation of confidence as it was imparted during negotiations. The need for confidence therefore must be implied and must exist throughout the period of negotiations.

Though the local common law is progressing incrementally, reliance on English principles will still continue on persuasive basis by virtue of section 3 and 5 of the Civil Law Act 1965. In mature systems, the comparative method is now very prominent. Reference to other common law jurisdictions such as Australia, Singapore and India will continue to play a role in developing the domestic legal system. Nevertheless, the development on protection of privacy as has taken place in the UK has not, so far, happened in Malaysia. The protection of privacy in the UK is the result of the incorporation of the Convention rights by the UK Human Rights Act 1998. The 1998 Act which heightened discussions on right of privacy in the UK, is consequently moving toward recognising the right of privacy. In addition, the courts in the UK have the opportunity to deliberate on the right of privacy when cases relating to the issue arise. The focus on privacy through the process of adjudication in courts helps to stimulate the development in the UK. In contrast, such development is lacking in Malaysia. For instance, the courts in Malaysia missed the opportunity to deliberate on the issue of right

⁸⁷⁶ *ibid.*

of privacy when a case involving a celebrity was tried under the criminal law. In this case, her landlord who had installed a surveillance camera in her apartment without her knowledge invaded the privacy of the celebrity.⁸⁷⁷

5.7 THE HUMAN RIGHTS COMMISSION OF MALAYSIA

5.7.1 THE FORMATION

Malaysia as part of the ASEAN states has displayed a general distrust of supranational institutions in dealing with human rights at the national level. Paragraph 24 of the Bangkok Declaration⁸⁷⁸ states:

We welcome the important role played by national institutions in the genuine and constructive promotion of human rights, and believe that the conceptualisation and eventual establishment of such institutions are best left for the States to decide.

Malaysia's active participation in the United Nations Commission on Human Rights (UNCHR) stimulates the formation of the national human rights institution. The creation of the Human Rights Commission marks a new chapter in Malaysian human rights culture and awareness. Despite sceptics and critics on its establishment, the existence of the Commission is a significant step towards preserving and extending human rights issues at the national level. A strong critic comes from Lim Kit Siang, an opposition political leader, who argues that the Human Rights Commission Act had from the beginning crippled the Commission by giving a very narrow and restricted definition of human rights.⁸⁷⁹

The existence of the Human Rights Commission is under the auspice of The Human Rights Commission of Malaysia Act 1999. The Act sets out the powers and functions of

⁸⁷⁷ I wasn't lying, says Ahmad Bakhtiar. *Bernama*, 18 November 2004.

<http://www.bernama.com/bernama/v3/news.php?id=62031>

⁸⁷⁸ The Bangkok Declaration in 1993 is adopted by thirty four Asian states at the Asian Regional Meeting, a preparatory to the Vienna Conference.

⁸⁷⁹ Lim Kit Siang, Human Rights Commission- irrelevant to human rights?

<http://malaysia.net/dap/sgar9907.htm>

the commission for the protection and promotion of human rights in Malaysia. The Act also states that the Commission is empowered to have regard to the Universal Declaration of Human Rights of 1948 but only "to the extent that it is not inconsistent with the federal constitution". The inclusion of the UDHR in the 1999 Act could pave a way for the incorporation of the UDHR principles especially the right of privacy into the local statutory framework. This is an issue that will be analysed later in this chapter.

5.7.2 BASIC FEATURES OF THE ACT 1999

There are four basic features of the Act that put the credibility of the Commission under scrutiny. First, section 2 of the Act confined human rights to fundamental liberties as enshrined in Part II of the Federal Constitution. The confinement is criticised as unsatisfactory because it narrows the scope of human rights to nine areas of fundamental rights. The qualified nature of some of the constitutional rights such as freedom of speech, assembly and association, may be seen to render the function of the Commission in protecting human rights superficial. Implicitly, the Commission will have to recognise the application of the repressive laws such as the Internal Security Act 1960, the Official Secrets Act 1950, the Printing Presses and Publications Act 1986, the Sedition Act 1948, the Police Act 1967, and the Universities and University Colleges Act 1971.⁸⁸⁰

Moreover, the existence of several laws that undermine human rights as referred to by section 2 casts a doubt as to the credibility of the Commission. With a limited role and mandate given to it, the Commission may not be able to effectively protect human rights. Nevertheless, the Commission would be able to promote a better understanding of the rights through education and awareness. The role of the Commission is more that of a watchdog rather than an arbitrator of disputes.

The second feature of the Act is section 4 (2) which accord the powers of the Commission. It provides that:

⁸⁸⁰ Netto, A. Malaysia's rights commission starts on wrong foot. *Asia Times Online*, 25 April 2000. <http://www.atimes.com/se-asia/BD25Ae01.html>

For the purpose of discharging its functions, the Commission may exercise any or all of the following powers:

- (a) to promote awareness of human rights and to undertake research by conducting programs, seminars and workshops and to disseminate and distribute the results of such research;
- (b) to advise the government and/or the relevant authorities of complaints against such authorities and recommend to the government and/or such authorities appropriate measures to be taken;
- (c) to study and verify any infringement of human rights in accordance with the provisions of this Act;
- (d) to visit places of detention in accordance with procedures as prescribed by the laws relating to the places of detention and to make necessary recommendations;
- (e) to issue public statements on human rights as and when necessary; and
- (f) to undertake any other appropriate activities as are necessary in accordance with written laws in force, if any, in relation to such activities.

Even though section 4 (1) states the functions of the Commission ‘In furtherance of the protection...of human rights’ but the powers accorded to the Commission do not reflect such a role. Instead, the six powers under sub section (2) relate to the role of promoting the rights in its consultative and advisory capacity. The Commission has no power to take affirmative action for infringement of human rights other than power of verification. This raises a question of whether protection of human rights is projected prominently on the development agenda of the government. Human rights may be part of a vital tenet in democracy, but it may not be the main interest that can override unity and political stability in Malaysia. According to Datuk Syed Hamid Albar, the then Minister of Law,

it is very crucial that human rights are seen in tandem with responsibility based on civility, politeness, discretion and reason to ensure peace and security.’⁸⁸¹

Obviously, the efficacy of the Commission is in question when it is powerless to take positive action to protect human rights. This affects the public confidence on the role of the Commission. Though the Act empowers the Commission to recommend appropriate measures to be taken by the government, it does not necessarily mean that the government has to abide by such a recommendation. This is evident when the Commission has recommended that amendments should be made to the ISA and PPA. But so far there has been no action taken by the government on such recommendation. As a result, the impact of this situation on the public perception is that the Commission is a weak institution. This is due to the fact that when the Commission calls for reform, it is not taken very seriously. Nevertheless, the Commission's statements and remarks draw attention to systemic human rights violations, which require far-reaching changes to the existing government practices for effective redress. Publicising such abuses serves to call the government to account. Publicity also informs and discloses to the public about the performance of the government and its agencies particularly in relation to human rights.⁸⁸²

Third, the Act does not provide for any enforcement mechanism or legal power to affect change or bring about actual relief. SUHAKAM does not have the power to sanction the government or others. To equip the Commission with an enforcement power may not be appropriate considering the fact that it may abdicate the judiciary power.

Fourth, the appointment of the members of the Commission raises a question of independence. Even though the government emphasises that independence is the main feature of the Commission, a priority to ensure its credibility, it does not ward off sceptics especially when the appointment of the Commission's commissioners is the prerogative of the government. Section 5 (2) provides that the members shall be

⁸⁸¹ Speech on the Human Rights Commission of Malaysia Bill 1999 delivered in the Dewan Rakyat on 15 July 1999. See Rachagan, S. and Tikamdas, R. (eds.) (1999) *Human Rights and the National Commission*. Kuala Lumpur, 104.

⁸⁸² The Commission produced several reports in pursuant to complaints on violation of human rights such as the Report on Freedom of Assembly. http://www.suhakam.org.my/docs/document_resource/freedom.pdf

appointed by the *Yang di-Pertuan Agong* (the King) on recommendation of the Prime Minister. The direct involvement of the Prime Minister who represents the executive to a certain extent raises legitimate doubt as to the ability of the Commission to exercise its functions and powers without direct or indirect influence of the government. In order for the Commission to be able to maintain its integrity and command public respect, the Commission must not only be independent in form but also in spirit. As such, an independent body under the auspice of Parliament should be given the task for selecting and appointing the commissioners.

There is no system of checks and balances to ensure that the appointment process is politically neutral. Nor is there any prescribed manner in which public consultation or participation is taken into account in the appointment. As human rights are matters of public interest, the membership of the Commission should reflect the wide interest of Malaysian society regardless of political inclination. The criteria of prominent personalities in section 5 (3) needs further clarification and expansion so that public interests can be served. As such there was resentment in the appointment of the second chairman of the Commission by local human rights movements. The chairman was a former Attorney General and perceived as closely associated with the government. This has reduced the public hope for the Commission to be an independent body.⁸⁸³

5.7.3 POWER AND AUTONOMY

The power of inquiry of the Commission into an allegation of the infringement of the human rights is limited. Section 12 (1) allows the Commission to conduct an inquiry on its own motion or on complaint. The power is restricted to matters that are not involved in the proceedings of the courts. The Commission has no power to inquire into an allegation of infringement of human rights if it is the subject matter of proceedings pending in courts or finally determined by the courts.⁸⁸⁴ In the case of an ongoing inquiry, the power will cease once the allegation becomes the subject matter of

⁸⁸³ Still an Independent Commission? Or BN's Tool? *Aliran*. <http://www.aliran.com/monthly/2002/4i.html>.
Lim Kit Siang, Abu Talib's appointment- bad omen for Suhakam?
<http://www.malaysia.net/dap/lks1519.htm>

⁸⁸⁴ Section 12 (2) of the Human Rights Commission of Malaysia Act 1999.

proceedings in courts.⁸⁸⁵ In this relation, the function of the Commission is limited to advisory capacity because it could not substitute the function of the courts in protecting human rights. Thus, the power of the Commission should be exercised to complement the role and the responsibility of the courts. Not all human rights violations are of such magnitude that requires arbitration. The contextual nature of human rights issues may render mediation as the appropriate way of addressing a matter rather than through adversarial approach.

In order for the Commission to perform its functions effectively, it is necessary for the institution to be autonomous. The autonomy at operational level is imperative to detach its credibility as a statutory body from ordinary government agencies. Any kind of influence by the executive may affect the public confidence because the Commission may be perceived as functioning under the influence of the government. The image of being a government's agency is unacceptable especially when the functions of the Commission surpass political and societal barriers. However, the autonomy of the Commission may be questionable when section 22 allows the Minister of Foreign Affairs to make regulations and affect the procedures the Commission follows in pursuing inquiries. This is directly contrary to the recommendation of the UN Handbook that the Commission establishes its own procedures and they may not be subjected to external modification. This suggests that autonomy at the policy level is also desirable.

The government plainly has an interest in preserving and maintaining the way public order is being regulated. In doing so, the government is not willing to compromise on issues of national security and public order even if it infringes the human rights. This supports the view that the government thinks in term of the expediency of matters purportedly to be in the interest of the nation as a whole. Thus, if human rights in Malaysia are to be taken seriously, the Commission must be principled. In this context, the former Prime Minister, Dr. Mahathir Mohamed, responded rather firmly on SUHAKAM's recommendation for public rallies during general election when he said 'For now, it looks like SUHAKAM seems to want to decide on everything.'⁸⁸⁶ According

⁸⁸⁵ Op cit section 12 (3).

⁸⁸⁶ PM: Decision on rallies not up to Suhakam. *The Star On-line*, 4 October 2003.

to him, the Commission should not interfere in making decisions. But the paramount interest as perceived by the government sometimes is allegedly being used to achieve other ulterior interest. This is established when SUHAKAM in its report on the Internal Security Act (ISA) found that the balance between national security and human rights is currently disproportionately weighted in favor of national security and there are inadequate safeguards against misuse or abuse of the detention provisions of the ISA. SUHAKAM also submits a proposal to the government to repeal and replace the ISA with a new comprehensive legislation.⁸⁸⁷

The power of the Commission to constitute an inquiry has no affirmative impact in bringing changes to the state of human rights particularly with regard to political rights. The Commission has no legal power to impose the outcome of its inquiry on the relevant public authorities or the government so that failure to act upon it may be penalised. Nevertheless, any inquiry by the Commission may serve as a moral pressure on the government to respond.

The effectiveness of the Commission in executing its dual functions of protecting and promoting human rights is also under scrutiny. It is hard to envisage how the Commission could effectively carry out its task under a government that allows derogation of human rights such as freedom of speech and personal liberty. The sceptics of the Commission criticise it as a symbolic institution so as to portray the concern and commitment toward human rights issues to the international community. In relation to this, the Minister of Law in delivering his speech on the Human Rights Commission Bill denied that the creation of the Commission was a public relation exercise. Nevertheless, the Commission is powerless to act in case of abuse of right because of lack of authority mandated to it. The lack of power and autonomy renders the main role of the Commission more as a consultative and advisory body to the government on matters relating to human rights than protecting the rights.

⁸⁸⁷ SUHAKAM's report on the Review of the Internal Security Act 1960 calls for new anti-subversion law. http://www.suhakam.org.my/docs/document_resource/isa.pdf

5.7.4 INCORPORATION OF UNCHR AND THE RIGHT OF PRIVACY

A positive and promising prospect for privacy to be recognised as a legal right may be found in section 4 (4) of the Human Rights Commission of Malaysia Act 1999. The section provides:

For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.

The provision specifically includes UDHR in the ambit of the Act as a source, which could be referred to by the Commission in exercising its function and powers. The inclusion of UDHR raises two main issues. First, whether the right of privacy in Article 12 of the UDHR is consistent with the Federal Constitution. Second, whether section 4 (4) has the effect of incorporating the principles in UDHR so as to make the principles applicable in the local scene.

In relation to the first issue, there is no explicit provision in the Federal Constitution which guarantees right of privacy. Thus, there is a question with regard to the justiciability of privacy. The courts are unable to deliberate on privacy if it is not a justiciable matter. In this regard, the Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*⁸⁸⁸ explained that if a matter is not justiciable, there is no right of access to justice in respect of that matter. The issue of justiciability of privacy could be determined by relying on the provision of Article 5 of the Constitution. The courts give a wider meaning to article which guarantees right to life to include matters that form the quality of life.⁸⁸⁹ The willingness of the courts to use a liberal and expansive interpretation expands the scope of life, which could provide an opportunity for the inclusion of privacy as a value that forms the quality of life. Using the liberal and expansive interpretation, the right of privacy could be recognised by the courts as it is within the domain of the judiciary. On this basis, it is also within the Commission's legitimate power to address the right of privacy in pursuant to UDHR as it is not

⁸⁸⁸ [2004] 2 MLJ 257, 270.

⁸⁸⁹ *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, 288.

inconsistent with the Constitution. Although the Commission may not be able to protect right of privacy due to lack of power, the Commission should make use of its power to conduct an inquiry on the state of privacy in Malaysia and publish its findings to the public.

In relation to the second issue, it is rather unfortunate when the Federal Court in *Mohamad Ezam Bin Mohd Noor v Ketua Polis Negara*⁸⁹⁰ does not favor the use of an international document in the domestic legal context. The inclusion of UDHR by section 4 (4) may not be on the basis of binding effect. The Commission is not duty bound to take into account the principles set out in UDHR in exercising their functions and powers. The effect of section 4 (4) does not make the principles in UDHR to be incorporated in the local provision. As such UDHR is not applicable as part of the local provision.

Siti Norma FCJ upholds this position when she based her finding on three reasons. First, the 1948 Declaration is not a convention subject to ratification instead; it is declaratory in nature with no force of law. Second, the provision can only be interpreted as an invitation to consider the 1948 Declaration. It does not create an obligation on the part of the Commission to apply the principles. The judge explained that:

This is so as my understanding of the pertinent words in the subsection that 'regard shall be had' can only mean an invitation to look at the 1948 Declaration if one is disposed to do so, consider the principles stated therein and be persuaded by them if need be. Beyond that one is not obliged or compelled to adhere to them.⁸⁹¹

Third, section 4 (4) of the Human Rights Commission Act 1999 provides qualification with regard to the 1948 declaration must not be inconsistent with the Constitution. The impact of this qualification may impede any effort to introduce any right that is not covered by Part II of the Federal Constitution. Consequently, the limited scope of human rights within the power of the Commission may hinder the prospect of right of privacy to receive recognition.

⁸⁹⁰ [2002] 4 MLJ 449.

⁸⁹¹ Ibid, 513-14.

However, Ram disagrees with this position. He argues that the wording of the provision 'regard shall be had' has been consistently interpreted as imposing an obligation. The language of the Act emphasises substantive and not procedural law. Thus, the provision should be interpreted as imposing prima facie mandatory and not merely directory.⁸⁹² On the other hand, Whiting argues that Siti Norma FCJ misconstrued the provision of section 4, which imposes an obligation to apply the principles of UDHR. She said that 'In her desire to preserve the integrity of 'our own laws backed by statutes and precedents' from the incursion of globalizing norms, the judge arguably misconstrued the mandatory sense of the word 'shall'.'⁸⁹³ Whiting's argument may be based on a statutory formula as being either mandatory or directory. This is illustrated in *Sing Hoe Motor Co Ltd v Public Prosecutor*⁸⁹⁴ where the court considered the interpretation of the word 'may' and 'shall' in relation to a provision under section 92 (4) of the Road Traffic Ordinance 1958. In this case, Raja Azlan Shah J said that 'If it is the intention of the legislature to construe "may" as "shall" it would have expressed so in unequivocal and comprehensive terms.'⁸⁹⁵ Currently, Malaysian courts are no longer fettered by the literal rule of interpretation. The position has changed through the codification of purposive rule of construction in section 17A of the Consolidated Interpretation Act 1948 and 1967. The provision reads:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

The adoption of such a liberal approach is in keeping with the purposive rule of interpretation and gives effect to the presumption that Parliament does not intend an unjust or unfair result.⁸⁹⁶

⁸⁹² Ram, G. S. Human Rights: Incorporating International Law into the Present System. (2003) MLJ. <http://www.mlj.com.my/free/articles/gopalsriram.html>

⁸⁹³ Whiting, A. Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission. (2003) 39 *Stan. J Int'l L.* 59, 88.

⁸⁹⁴ [1968] 2 MLJ 54.

⁸⁹⁵ Ibid, 56.

⁸⁹⁶ Sri Ram, G. Independence of Judiciary and Judicial Accountability. <http://www.clea.org.uk/clea/paper4.htm>

In relation to this, SUHAKAM does not elaborate on this point except merely recognises the provisions of UDHR and its application in Malaysia to the extent its provisions do not conflict with the provisions of the Federal Constitution.⁸⁹⁷ Summarily, Siti Norma's position on the application of UDHR is an obiter that does not create a binding precedent. Relying on Ram's argument, it is difficult to ignore the assumption that there is a mandatory application of the principles of UDHR.

Nevertheless, even if section 4 (4) does not have the effect of incorporating UDHR, on Siti Norma's account, the Commission could still regard the 1948 instrument as highly persuasive for the purpose of domesticating and upgrading the condition of human rights. It would seem unfortunate if human rights, as the crux of a democratic society, are being marginalised while the nation is gearing up to become a developed democratic country by the year 2020.

5.8 CONCLUSION

Privacy does not have a universal value that could be claim across all contexts. The value of privacy in a particular context depends upon the social importance of the practice of which it is a part. As such, Malaysia has no freestanding law on right of privacy. But by no means does this indicate that the right is being neglected in Malaysian society. Deliberation on privacy is stimulated more by the economic agenda rather than the emphasis as a fundamental right. Though wide interpretation of right of life under the Constitution may include privacy as an interest, protection of privacy is left under the purview of SUHAKAM as the human rights institution in the absence of judicial recognition.

The importance of privacy as a right could be informed by deontological as well as consequentialist moral impulses, both for its own sake and its usage. This is apparent with the existence of institutional mechanism that gives protection to privacy-related interests. Since there is no independent cause of action for invasion of privacy, the courts could develop the existing common law principles, though unsatisfactory, to provide the

⁸⁹⁷ What is Human Rights? The application of UDHR in Malaysia. *Suhakam*.
http://www.suhakam.org.my/en/hr_what_is.asp

redress. This would necessitate the shift from statutory law orientation to incremental development under common law. The protection of privacy on this account however is not a revolutionary encounter. It would involve no more than a development of impulses already present in the law. If privacy is to be taken seriously as a fundamental right in Malaysia, the courts, through its judicial activism, should develop a distinct tort on privacy to institutionalise the right of privacy protection.

CHAPTER 6

ACCOMMODATION OF CONFLICTING INTERESTS

6.0 INTRODUCTION

Recognition of both privacy as an individual right and the importance of freedom of expression create a classic situation of a clash of interests. A tension exists when these two fundamental rights, which promote different interests, are in conflict. Accommodation of individual needs for privacy and the public's right to know through freedom of expression may appear uncomplicated but nevertheless entwine with practical difficulty. Though each could be accommodated by way of institutional design, it may be unsatisfactory to rank attractive options.

Invasion of personal privacy is considered as affront to a person's dignity⁸⁹⁸ whereas restriction on freedom of expression is contrary to liberal democratic belief, which reveres free flow of information. But this is by no means to suggest that privacy and freedom of expression are valuable only on utilitarian account. Both can be justified in deontological and consequentialist terms. Whilst protection of privacy is necessary, the potential chilling effect it has on freedom of expression raises a question of competing interests.

Thus, it is pertinent to examine the approach adopted by the courts in providing reconciliation between the competing interests. It is important to ensure that the appropriate approach does not reduce the fundamental character of both rights. Discussion on this matter starts with examining the balancing approach which is the prevalent method adopted by the courts. We now turn to a very practical matter relating to institutional design.

⁸⁹⁸ Per LaForest J in *R v Dymont* (1988) 2 SCR 417, 429-30.

6.1 BALANCING APPROACH

The issue of competing rights may seem to be a straightforward matter. A simple way to resolve the clash is by identifying the right that is deemed to be more important than the other. A common method of resolving two competing interests is by way of balancing exercise. Aleinikoff argues that the mechanics of balancing involve identification, valuation, and comparison of competing interests.⁸⁹⁹ The balancing act operates by identifying interests implicated by the case and reaches a decision by explicitly or implicitly assigning values to the identified interest. From a constitutional point of view, balancing is an explicit judicial weighing of competing values or interests to determine a constitutional doctrine or its application.⁹⁰⁰

The exercise is carried out in order to determine the preferred right by taking into account the circumstances involved in a given case. A simple way of balancing is when the competing rights are weighed against each other based on presumptive common scale. The end result is determined by whichever is the weightier thus prevail.⁹⁰¹ In this regard, Alexy argues that balancing exercise is an indispensable form of a rational practical discourse that protects the status of right rather than cause degradation.⁹⁰² His argument is partly true when the status of the weightier right on the scale prevailed but the lighter one is reduced to an interest under exemption scheme.

This approach is part of adjudicatory exercise, which articulates contextual scrutiny of social interests by weighing the interests at stake.⁹⁰³ The exercise of balancing is founded on normative judgment of interests protected by the rights. The weight of a right is given according to a standard that measures the value of the right. Keene LJ explained the operational mechanism of the approach by stressing that the court needs 'to apply its mind to how one right is to be balanced, on the merits against another right, without

⁸⁹⁹ Aleinikoff, T. A. *Constitutional Law in the Age of Balancing*. (1987) 96 *Yale L J* 943, 944.

⁹⁰⁰ Henkin, L. *Infallibility under Law: Constitutional Balancing* (1978) 78 *Col. L R* 1022, 1024.

⁹⁰¹ McHarg, A. *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*. (1999) 62 *MLR* 671, 678.

⁹⁰² Alexy, R. *Constitutional Rights, Balancing and Rationality*. (2003) 16 *Ratio Juris* 131.

⁹⁰³ Pound, R. *A Survey of Social Interests*. (1943) 57 *Harv. L. Rev.* 1.

building in additional weight on either side.’⁹⁰⁴ On this account, the presumption is that the conflicting rights are equal in status and determinable on merits based on a common standard. Resolution of competing interest by way of balancing is made on the estimation of merits of the competing claims. The balancing scheme may be an appropriate approach to a resolution of conflicting rights, which are paralleled in term of standards and values. But it may not be so if common standards and values are absent.

Perhaps the attractiveness of balancing is that it facilitates the growth of law by focusing on interests, based on a complex mixture of social, political and institutional factors. It also accommodates gradual change and rejects absolutes. The practical utility of the approach could make a judge more versatile in assuming the role of a social scientist in applying a deductive logic instead of an inductive investigation of interests in a social context.⁹⁰⁵ It is an instrumental approach that perceives law as a means to an end. In order for balancing to be a satisfactory method of resolving conflicting interests, the courts must not be seen as the arbiter of taste.⁹⁰⁶ As far as it lies within human limitations, it must be an impersonal judgment resting on fundamental pre-suppositions that are widely accepted. Nonetheless, it is difficult to ward off prejudices and inclinations as observed by Robertson where ‘British judges are wedded to a ‘balancing act’...which permits their own prejudices to tip the scales.’⁹⁰⁷

There is an element of subjectivity in balancing particularly when the judges assess the relative weight of conflicting rights in each case. The problem with this approach is that it may subject the decision-making exercise leans towards preferential treatment. For instance, in law of defamation where reputation is in conflict with freedom of speech, the former seems to acquire a premium value, which makes its protection preferable over speech. The inclination to protect a reputation is far greater than speech that is presumed to be false. It is the task of the defendant in a defamation case to prove, *inter alia*, that the speech is true which sometimes put the press in a difficult situation particularly for the purpose of protecting the source. Therefore, in finding resolution to an issue of

⁹⁰⁴ *Douglas v Hello! Ltd* [2001] 2 All ER 385, 391.

⁹⁰⁵ Aleinnikoff, T. A. Constitutional Law in the Age of Balancing. (1987) 96 *Yale LJ* 943, 965.

⁹⁰⁶ *A v B plc* [2002] 3 WLR 542, 552.

⁹⁰⁷ Robertson, G. and Nicol, A. (2002) *Media Law*. London, x.

competing fundamental rights, which represent different and variable interests, balancing exercise invites more questions than answers.

A vexed question concerns the standard used to determine which of the competing right is to prevail. For example, in case of protection for journalistic confidentiality, though the courts recognise the importance of public interest in the free flow of information, greater weight is placed on the potential damage that may cause on companies or the government compared to the potential and abstract damage to free flow of information.⁹⁰⁸ Harm to the public interest caused by a loss of free flow of information cannot be satisfactorily quantified. But the potential financial loss to a company or impact on the government is a matter to which the courts are willing to give considerable weight.

The issue of competing rights is difficult to resolve especially when the rights in clash are equally recognised but involve different kinds of interests in opposite directions.⁹⁰⁹ Arguably, it is doubtful if balancing exercise is the appropriate approach using the scale standard for rights of different values and characters. Under the balancing structure, weight is given depending on the value of interests. The values that determine the weight are assessed from various criteria according to history, social consensus on the importance of an interest and are based on their contribution to the achievement of constitutional goals. It is difficult to ascertain the rank of interest on the basis of descriptive criteria. To do so would only invite a contention that balancing is exercised on the basis of taste and preference. Lord Donaldson MR remarked that:

...but in truth this is an objective which is incapable of achievement, not least because a balance of competing rights lies at the heart of the problem and this must depend upon a multiplicity of factors which vary from case to case.⁹¹⁰

⁹⁰⁸ *British Steel Corporation v Granada* [1981] AC 1096. *X Ltd v Morgan Grampian Ltd* [1991] 1 AC 1.

⁹⁰⁹ Wade, H. and Forsyth, C. (2004) *Administrative Law*. Oxford University Press, 178.

⁹¹⁰ [1990] 1 All ER 205, 214.

6.1.1 DISTORTION IN BALANCING APPROACH

There are some doubts and sceptics as to whether balancing can resolve competing interests satisfactorily.⁹¹¹ The flexibility of the approach by taking into account the circumstances surrounding the interests may lead to unprincipled resolution of competing rights. There is a risk of making arbitrary value judgments. The outcome of balancing is not justifiable in term of right and wrong but only as appropriate or sufficient to varying degree.⁹¹² The more facts are taken into account in the application of relative weigh in one case, the more likely that it will produce a different result in another. This may lead to an uncertainty in the adjudication and resolution of disputes involving fundamental rights such as between privacy and freedom of expression. Distortion in balancing structure may occur when freedom of expression is given a presumptive primacy by the courts.

6.1.2 PRESUMPTION OF PRIMACY

A presumption of primacy creates an imbalance that makes freedom of expression acquiring extra weight on the balancing scale. This occurs when protection of privacy requires justification whereas the importance of freedom of expression is rooted on assumption. The presumption also sets an inclination toward protecting freedom of expression which can only be set aside if it can be convincingly established that preserving other interest is more important. The court in *Reynolds v Times Newspapers*⁹¹³ adopted the position when Lord Steyn stated that:

The starting point is now the right of freedom of expression, a right based on a constitutional or higher legal order foundation....freedom of expression is the rule, and regulation of speech is the exception requiring justification.⁹¹⁴

⁹¹¹ Dworkin, R. (1977) *Taking Rights Seriously*. London, 198-99. See Alder, J. Incommensurable Values and Judicial Review: The Case of Local Government. (2001) *PL* 717, 718. See also the argument by the counsel for the press in *Venables and another v News Group Newspapers* [2001] 1 All ER 908, 913.

⁹¹² Habermas, J. (1996) *Between Facts and Norms*. Cambridge, 261.

⁹¹³ [1999] 4 All ER 609.

⁹¹⁴ Ibid, 629. See also per Lord Nicholls *Reynolds v Times Newspapers Limited* [2001] 2 AC 127, para 200.

The unequal treatment, which tilted in favour of freedom of expression, is structurally incoherent as it may defeat the basic scheme of fundamental rights instituted under the Convention. The emphasis given to freedom of expression though does not amount to a trump element, practically reduces the weight of other fundamental right. The press enjoys heavy weight when the importance of the press freedom of expression is enhanced by the corresponding freedom of the public to receive information. In this context, Smith J in *Al-Fagih v HH Saudi Research and Marketing (UK) Ltd*⁹¹⁵ said that:

The weight to be accorded to each of the various factors will vary according to the circumstances of the case. If at the end of the balancing exercise the court is in doubt, it will resolve the doubt in favour of publication.

The remark portrays a situation whereby the judges have not fashioned a clear decision-procedure. They are lapsing into common law multifactorialism where there is a tendency to identify a range of relevant considerations to which more or less weight will be given in light of the facts of the case at hand. On this point, Mullender argues that the multifactorial approach lacks of systematisation that could lead to ill-structured judicial discretion.⁹¹⁶

The status of freedom of expression as a primary right in democracy gained support by majority of the Law Lords in *R v Secretary of State, ex p Simms*.⁹¹⁷ The court stated that without free expression an effective rule of law is not possible. However, the court also recognised that it is not an absolute right. Sometimes freedom of expression must yield to other forceful interests such as the protection of the reputation of individuals, security and public order. The court in *Re S (FC) (a Child)*⁹¹⁸ exhibits a similar stand when Lord Steyn concurred with the approach of the lower court by acknowledging the force of the argument under Article 10 before considering whether the right of the child under Article 8 was sufficient to outweigh freedom of expression. The court ruled that there is no injunction in respect of publication of the identity of the defendant or of photographs of the defendant or her deceased son. It could be argued that such a treatment presents an

⁹¹⁵ [2002] EMLR 215.

⁹¹⁶ Mullender, R. Tort, Human Rights, and Common Law Culture. (2003) 23 *OJLS* 301, 306.

⁹¹⁷ [2000] 2 AC 115.

⁹¹⁸ [2004] UKHL 47, para 37.

asymmetry, which is not appropriate when there is an issue of competing fundamental rights that should be resolved by the courts on equal terms. Since both Articles 8 and 10 provide for qualified rights it should be considered as independent elements. Each article is an exception, which allows the interest under the other article to be taken into account.

Moreover, presumptive primacy of freedom of expression could reduce the intrinsic character of competing right where right of privacy 'would lose its Convention status as a fully-fledged right.'⁹¹⁹ This is inconsistent with the existence of the 1998 Act that recognises inalienable human rights based on the equal protection scheme of the Convention. Sedley LJ in delivering his judgment disagreed with the prioritizing of freedom to publish over other Convention rights because it is not consistent with the Parliament's design and the European Convention.⁹²⁰ Council of Europe Resolution 1165 of 1998 states that right of privacy and freedom of expression are fundamental to a democratic society and 'These rights are neither absolute nor in any hierarchical order, since they are of equal value.' In relation to this, Phillipson argues that presumptive priority of freedom of expression is a 'radical distortion' of the Convention scheme because it relegates the status of other Convention rights.⁹²¹ Thus, emphasis on freedom of expression needs to be made on evaluative basis rather than presumptively given primacy.

The difficulty in measuring the respective weight of each interest requires that the interests be balanced in some way commensurable on a single scale.⁹²² Therefore, for balancing to become a practical mode of adjudication, the interests involved must have certain common characters related to each other. Relative weight given to each interest poses a question of standard applicable in allocating the proportion of greater or lesser weight to a particular interest. In this context, Dworkin argues that though liberty is important, some liberties are more important than others. However, identifying the more

⁹¹⁹ Phillipson, G. and Fenwick, H. Breach of Confidence as a Privacy Remedy in the Human Rights Act Era. (2000) 63 *MLR* 660.

⁹²⁰ Council of Europe Resolution 1165 of 1998 states that right of privacy and freedom of expression are fundamental to democratic society. 'These rights are neither absolute nor in any hierarchical order, since they are of equal value.'

⁹²¹ Phillipson, G. Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act (2003) 66 *MLR* 726.

⁹²² Campbell, T. and Goldberg, D. (1986) *Human Rights: From Rhetoric to Reality*. London.

important liberty based on aggregation of values is unsatisfactory.⁹²³ Liberty represented by interest would make it contingent on convictions or preference.

In addition, there does not seem to be a common scale where values of each fundamental right can be balanced to determine the result. It is argued that the approach of balancing is unsatisfactory to accommodate the competing rights between freedom of speech and privacy because of the absence of a common scale to perform the balancing. At the same time, it is difficult to balance freedom of the press in which case the core thematic interest is disclosure of information with privacy that stresses on retention of information. Thus, the absence of a common scale where competing values can be assessed creates a distortion in balancing exercise that leads to a legitimate query of the outcome. It therefore makes the metaphor of balancing as misleading.⁹²⁴

Besides the general balancing method, an accounting analysis of cost and benefit (CBA) can also be applied to adjudge the issue of competing rights. CBA is a decision-making method in which things that have no market prices are treated as if they are commodities. They are given a monetary value, a form of price. This is a utilitarian approach that considers accounting analysis in preferring the impact of interest in general. Interest that costs less and gives more benefit will acquire more weight. This kind of balancing is problematic as it imposes a formidable task on the courts. An element of distortion in the result of analysis may occur when the courts undervalue the real weight of competing interests by relying on general factors.⁹²⁵

It is difficult to apply a cost and benefit analysis in a situation where one right is deemed to benefit the general society compared to a right that brings benefit to individuals. In term of cost, the acceptance of right of privacy may hinder the public's right to receive information or the public's interest in freedom of the press. The evaluation of cost on more general terms than benefit makes the application of the analysis to human rights

⁹²³ Dworkin, R. (2002) *Sovereign Virtue: The Theory and Practice of Equality*. Cambridge, 180-181.

⁹²⁴ Alder, J. Incommensurable Values and Judicial Review: The case of local government. (2001) *PL* 717.

⁹²⁵ Criag, P. (2003) *Administrative Law*. London, 431.

issues unsatisfactory.⁹²⁶ Another distortion that may question the reliability of the analysis is when the evaluation of cost is made on more general terms than the benefit.

Another technique employed to reconcile the issue of competing interest is to reduce the level of protection accorded to one interest under zero-sum method. Similarly, this technique portrays the difficulty in balancing two equally valuable interests with no certainty as to the standard used. Accommodating conflicting rights on this account is not satisfactory particularly if a decision has to be made on hard and controversial choice. But it may be sensible if the decision is based on a deductive judgment of all considerations, which justify the importance of one interest over the other.

In the UK, the incorporation of European Convention rights under the Human Rights Act 1998 creates a perennial competing rights issue. This is apparent with the clash between freedom of expression, which includes the public's right to know under Article 10 of the Convention and the protection of privacy under Article 8. The tension is inevitable when both rights are recognised as vital and fundamental in protecting the interests involved.

The Human Rights Act 1998 does not provide a specific mechanism in case of conflict other than requiring interference with any right to be justified. For instance, interference with privacy must be justified according to Article 8 (2). Likewise, any restriction on freedom of expression must fulfill the requirements of Article 10 (2). Nevertheless, the courts in the UK resort to balancing approach as a way to reconcile the competing rights. Lord Reid recognised that public policy required a balancing of interests that might ultimately conflict.⁹²⁷ Lord Morris, on the other hand, asserted that the exercise of this function necessitate a fair consideration of both interests.⁹²⁸ Lord Woolf explained that:

There is a tension between the two articles which requires the court to hold the balance between the conflicting interests they designed to protect. This is not an easy task but it can be achieved by the courts if, when

⁹²⁶ Kennedy, D. The International Human Rights Movement: Part of the Problem? (2002) *15 Harv. HRJ* 101, 102.

⁹²⁷ *AG v Times Newspapers Ltd* [1974] AC 272, 301.

⁹²⁸ *Ibid*, 302.

holding the balance, they attach proper weight to the important rights which both articles are designed to protect.⁹²⁹

However, the application of balancing competing interests does not receive full support by the judiciary. For instance, Lord Widgery CJ in *AG v Times Newspapers Ltd*⁹³⁰ opined that the balancing of public interest was an administrative rather than a judicial function. If such a function were left to the courts, it would give rise to an uncertainty and inconsistency of decision. It is not an easy task to find a proper or fair balance⁹³¹ taking into consideration the variable standards relied by the courts in determining the protected interests.

In striking the balance, different judges naturally weight rights and responsibilities differently. Fox LJ in *Blackshaw v Lord*⁹³² acknowledged that on the one hand, there is the need that the press should be able to publish fearlessly what is necessary for the protection of the public, and on the other hand, there is the need to protect the individual from falsehoods. He disagreed with the test of 'legitimate and proper interest to English newspaper readers'⁹³³ in resolving the clash between freedom of expression and reputation where it would tilt the balance to an unacceptable degree against the individual. Reliance on such a test would 'protect persons who disseminate 'any untrue defamatory information of apparently legitimate public interest, provided only that they honestly believed it and honestly thought that it was information which the public ought to have'.⁹³⁴

The absence of precise rules and principled standard creates uncertainty in the exercise of balancing between competing rights. Balancing is also more delicate in case of clash between private interests. This was encountered by the court in *A v B Ltd* where there was a clash between privacy interest and freedom of the press in the publication of facts about the claimant. The court took into consideration the private interest of the newspaper in

⁹²⁹ *A v B plc* [2003] 3 WLR 542

⁹³⁰ [1973] 1 QB 710, 726.

⁹³¹ Approach employed by the ECtHR in adjudicating competing interests. See *Sporrong v Sweden* (1982) 5 EHRR 35, 52. See also per Lord Bingham in *Brown v Stott* [2001] 2 All ER 97, 113.

⁹³² [1984] QB 1.

⁹³³ *Webb v Times Publishing Co Ltd* [1960] 2 QB 535, 570.

⁹³⁴ [1984] QB 1, 42.

justifying the importance of press freedom on the ground of public interest. It is unclear as to on what merit the commercial interest of newspaper can enhance the public interest of the community. The standard of public interest varies when it concerns the press. Commercial interest is taken into consideration, as people's private lives become a highly lucrative commodity for certain sectors of the media. In this regard, news is treated as a perishable commodity. To delay its publication, even for a short period, may well deprive it of all its value and interest.⁹³⁵

The ECtHR in *Von Hannover v Germany* considers the commercial interest of the press.⁹³⁶ The Court ruled that the public did not have a legitimate interest in knowing where the applicant was and how she behaved in her private life even if she appeared in places that could not always be described as secluded and despite the fact that she was well known to the public. Even if such a public interest did exist, the interest as well as the magazines' commercial interest must yield to the applicant's right to effective protection of her family life.

In addition, Fenwick argues that in case of privacy of a child, journalistic invasion of privacy tends to be driven by a desire for sensationalism, purely for commercial considerations.⁹³⁷ Publication by the press does not meet the vital element of Article 10 to impart 'information on matters of serious concern'.⁹³⁸ On the other hand, Lord Donaldson MR⁹³⁹ stated that a clear rule in determining the issue between protecting the right of the press to publish and to protect the welfare of a child is an objective that cannot be achieved. Therefore, it is arguable if general balancing is the appropriate approach in providing resolution to safeguard the welfare of a child⁹⁴⁰ or other recognised important interests such as reputation.

Moreover, value judgments in the balancing exercise create uncertainty in reaching the outcome. Nevertheless, the judgment cannot be entirely eliminated, particularly in

⁹³⁵ *The Observer and The Guardian v UK* (1992) 14 EHRR 153, para 60.

⁹³⁶ (2004) EMLR 21.

⁹³⁷ Fenwick, H. Clashing Rights, the Welfare of the Child and the Human Rights Act. (2004) 67 MLR 889.

⁹³⁸ *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, para 59.

⁹³⁹ [1990] 1 All ER 205, 214.

⁹⁴⁰ *R v Central Independent Television plc* [1994] 1 All ER 641.

relation to rights that are usually underdeterminate. For instance, in case of determining public figure so as to ascertain the extent of privacy entitlement as compared to an ordinary person. The right to privacy according to the Parliamentary Assembly of Council of Europe in the declaration on mass communication media and human rights⁹⁴¹ means 'the right to live one's own life with a minimum of interference'. The level of minimum interference may not be the same in case of public figures who are distinguished from the rest of the public due to their role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain. Certain latitude is given to the press when free expression receives an inappropriate weight, which may not be applicable to ordinary people. Conversely, the weight of privacy in case of public figures is lighter on the scale of balancing.

One of the problems with balancing relates to subjective considerations that vary from case to case. Perhaps effective balancing of competing rights involves giving due weight.⁹⁴² The interest a right seeks to protect determines the scale. The more important the interest deemed to be, the heavier would be the scale of balance. For instance, the court in *A v B plc*⁹⁴³ gave premium value to free expression when it said 'Any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society.'⁹⁴⁴ Notably, there is no gradation of rights under the Convention, which could create a pre-emptive interest in case of conflict.⁹⁴⁵

Nevertheless, emphasis on freedom of expression seems to exist under the Human Rights Act 1998 where section 12 implies a higher weighting for speech interests. It provides the courts to have a 'particular regard' to Article 10 when making any order that might infringe it. However, it does not make freedom of expression as an overriding right that

⁹⁴¹ (1970) Resolution 428.

⁹⁴² Markesinis. B, et al. Concerns and Ideas about the Developing English Law of Privacy. (2004) 52 *Am. J. Comp. L.* 133, 152.

⁹⁴³ [2002] 3 WLR 542.

⁹⁴⁴ *Ibid*, 549.

⁹⁴⁵ It would be much easier to adjudge the conflict if there were a prioritized interest. But this is not the scheme under the English law or the European Convention.

always prevail under balancing act. As Sedley LJ in *Douglas v Hello! Ltd*⁹⁴⁶ said, in relation to free speech interest and privacy, that 'neither element is a trump card.'⁹⁴⁷ Even though section 12 (4) requires a particular reference be made to freedom of expression it does not give the right a pre-eminence status over the other.⁹⁴⁸ The majority of judges upheld similar position in *Cream Holdings Ltd v Banerjee*⁹⁴⁹ when they rejected the view that freedom of expression has priority over other Convention rights.

To give a presumptive primacy to freedom of expression is to create an imbalance on the scale prior to balancing exercise. The outcome of balancing is, thus, a result of weight distortion. It would make freedom of expression as the primary right with trump effect overriding other rights such as privacy.⁹⁵⁰ Moreover, it is a disadvantage to the other competing right where it needs more values to tilt the scale. This is hard to achieve when the presumption would mean that the scale would always be in favour of freedom of expression. The premium weight accorded to freedom of expression would make the proper or fair balance appears to be superficial. Perhaps the argument forwarded by Markesinis et al. relying on judgment by Barak CJ could enlighten the proper balancing exercise. The judge said:

...the solution of these conflicts does not lie in ignoring one principle and completely preferring another. Rather, the proper method is to place the principles side by side, giving appropriate weight to each, and balancing them at the point of conflict. This is a 'process of placing competing values on a scale, and choosing those that, after the weighing process, are stronger under the circumstances.'⁹⁵¹

Even if the operational aspect of balancing as explained above is preferable, it does not make balancing as the satisfactory resolution. It could be argued that the common scale used to resolve two different and opposite competing interests is misconceived. The issue of competing rights may not be satisfactorily resolved by a general balancing exercise for

⁹⁴⁶ [2001] 2 All ER 289.

⁹⁴⁷ Ibid, 323.

⁹⁴⁸ *Re S (a child)* [2003] 3 WLR 1425.

⁹⁴⁹ [2003] 2 All ER 318.

⁹⁵⁰ This is in consistent with the scheme under the Convention which treats both rights as equally important.

⁹⁵¹ Cited in Markesinis, B. et al. Concerns and Ideas about the Developing English Law of Privacy. (2004) 52 *Am. J. Comp. L.* 133, 156.

‘there is no objective measure against which the competing interests can be weighed.’⁹⁵² Balancing approach deprives constitutional rights of their normative power. By means of balancing, rights are downgraded to the level of goals, policies, and values. As Habermas argues that there are no rational standards for balancing. Weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies.⁹⁵³

Another way of giving primacy status to freedom of expression is the requirement that interference with the freedom must be justified in exceptional circumstances.⁹⁵⁴ The English courts have so far reluctant to recognise the existence of right of privacy even though the right is incorporated by the HRA. Without such recognition, which would allow right of privacy to be regarded in *pari passu* with free speech, the traditional emphasis on the latter would prevail. This attitude accords wide latitude to freedom of expression while limiting the extent of its interference. Consequently, this creates an indirect gradation of rights where privacy is relegated to any other social interest under Article 10 (2). From this perspective, privacy is regarded as an exception that can inhibit the primary right. It needs justification to make the exception prominent in order to outweigh the right. But the courts rule that exception to free speech needs to be interpreted narrowly.⁹⁵⁵ It also reduces the role of the courts to exercising a technical task of checking whether interference is within the objectives sanctioned by the law.

Distortion may also occur when the courts give high regard to freedom of expression. This happens when high value is given to the right, which has a pre-eminence effect over other rights such as right of privacy. The right acquires an added value through the benefit it brings to the public as a whole rather than an individual’s interest. This attitude is adopted by the court in *Reynolds v Times Newspapers Ltd*⁹⁵⁶ when Lord Nicholls stressed on the interest of a democratic society in giving heavy weight on free press. The same approach is discernable in *A v B plc*⁹⁵⁷ when Lord Woolf took into account the role of the press in society in requiring justification for interference with the press. The public

⁹⁵² Alder, J. (2002) *General Principles of Constitutional and Administrative Law*. Palgrave, 446.

⁹⁵³ Habermas, J. (1996) *Between Facts and Norms*. Cambridge, 259.

⁹⁵⁴ *Mills v News Group Newspapers* [2001] EMLR 41.

⁹⁵⁵ See *Theakston v MGN* [2002] EMLR 22, para 31.

⁹⁵⁶ [2001] 2 AC 127.

⁹⁵⁷ [2002] 3 WLR 542, 549.

interest in free flow of information and the public right to know may override the protection of individual's privacy. Thus, the wider benefit consideration enhances the importance of freedom of expression in the society. In this context, Sir John Donaldson MR in *AG v Guardian Newspapers Ltd (No 2)* explained the importance of protecting freedom of expression and the press by saying:

It is because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to publish is neither more nor less than that of the general public. Indeed it is that of the general public for whom they are trustees.⁹⁵⁸

In addition, another possible reason for prioritising expression is the absence of a distinct law of privacy where the right can be specifically protected against infringement. This is exacerbated by the uncertainty of the application of the Convention right of privacy horizontally between private individuals. The penumbra of right of privacy may give mileage to freedom of expression, which is well established and widely recognised.

The nature of the right to free expression carries extra weight that always gives an advantage on balancing scale. The attitude of the courts in giving broad appreciation to freedom of expression makes balancing a misleading metaphor in producing a satisfactory outcome. However, the nature of the right and its benefit to larger interest should not be the sole criteria for carrying extra weight. There exists misappropriation of weight where premium is given prior to balancing exercise that contributes to unjustifiable distortion.

On the other hand, balancing may be of a practical assistance if it can be accepted that the importance of freedom of expression does not make it immune from being overridden by other rights. Other competing rights should not be treated as mere exceptions, but instead as equal as freedom of expression in term of status. The inclusion of relevant privacy code which the courts must have regard in section 12 (4) of the Human Rights Act 1998 denies the notion of primacy of freedom of expression. It makes the invocation of press freedom conditional upon adherence of the code. Freedom of expression only has a high

⁹⁵⁸ [1990] 1 AC 109, 183.

degree of exclusionary force where the right is exercised in ways that advance or promote its informing purposes.

Therefore, balancing cannot be properly construed as requiring the courts to give any priority to freedom of expression when the exercise of it is subjected to fulfillment of certain requirement. In this regard, section 12 (4) also implies that any breach of privacy code may be used as a justification for inhibiting freedom of expression.⁹⁵⁹ Sedley LJ disagreed with prioritising the freedom to publish because it gives an edge to the press, which is unbecoming of Parliament's design. He said that 'everything will ultimately depend on the proper balance between privacy and publicity...'⁹⁶⁰ The metaphor of proper balance or fair balance may imply the equal emphasis on fundamental character of both rights.

6.1.3 PRESUMPTION OF EQUALITY

There is a presumptive equality with regard to freedom of expression under Article 10 and privacy under Article 8.⁹⁶¹ Both articles do not create an explicit distinction that could make one override the other because each right qualifies the other. Article 10 (2) recognises that the exercise of the right may be subject to '...protection of the reputation or rights of others, for preventing the disclosure of information received in confidence...' Therefore, it is untenable to have particular regard to freedom of expression without having the same regard to Article 8.⁹⁶² Moreover, the Council of Europe's Resolution 1165 of 1990 stated that:

11. The Assembly reaffirms the importance of every person's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.

There are two basic components in balancing namely the scale and weight. Structural problem of the approach rests on the misleading scale employed. It is difficult to defend

⁹⁵⁹ Brooke LJ in *Douglas v Hello! Ltd* [2001] QB 967, 994.

⁹⁶⁰ *Ibid*, 1004.

⁹⁶¹ Rogers, H. and Tomlinson, H. Privacy and Expression: Convention Rights and Interim Injunctions. (2003) *EHRLR*. See Hale LJ. in *Re S (a Child)* [2003] 3 WLR 1425, 1450.

⁹⁶² MacDonald, J. and Jones, C. H. (eds.) (2003) *Freedom of Information*. Oxford, 645.

balancing act when the scale used is presumed to be applicable to distinct interests such as free expression and privacy. Unequal treatment of the competing rights may result in unequal balancing scale. Whereas, a proper balancing act require the scale to be equally set.⁹⁶³ It is contended that balancing is not the correct approach when there is a presumption in favour of free expression, which is a primary right in democracy.⁹⁶⁴

This argument leads to the next approach in resolving competing interests where weighing is done in a seemingly structured and scientific manner.⁹⁶⁵

6.2 PROPORTIONALITY: A MEDIATING PRINCIPLE

Another approach of resolving the issue of competing rights is by relying on proportionality principle. Proportionality requires a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective.⁹⁶⁶ It is an approach to find a balance between the interests of the individual and the interest of the wider community.⁹⁶⁷ Feldman argues that this is not an exercise of balancing the right against the interference, but instead balances the nature and extent of the interference against the reasons for interfering.⁹⁶⁸

The incorporation of the Convention rights by the Human Rights Act 1998 brings the application of proportionality into local cases involving the Convention rights.⁹⁶⁹ Proportionality as a mediating principle, described as ‘the discretionary area of judgment in a national court’,⁹⁷⁰ accommodates competing rights by emphasising on the necessity of right. Necessity is determined in accordance with the standard of a democratic society. The structure of the society, which is characterised by ‘pluralism, tolerance and

⁹⁶³ See *Douglas v Hello ! Ltd* [2001] QB 967, 1004.

⁹⁶⁴ See argument by counsel representing the press in *Venables v News Group Newspapers* [2001] 1 All ER 908, 913.

⁹⁶⁵ Blake, N. Importing Proportionality: Clarification or Confusion. (2002) 1 *EHRLR* 19, 26.

⁹⁶⁶ Halsbury's Laws of England, 4th ed. Vol 1(1). Butterworth, para 78.

⁹⁶⁷ Taylor, N. Policing, Privacy and Proportionality. (2003) *EHRLR* (Special issue). See also Lord Lester and Pannick, D. (1999) *Human Rights and Practice*. London, Butterworth, para 3.09.

⁹⁶⁸ Feldman, D. (2002) *Civil Liberties and Human Rights in England and Wales*. Oxford, 57.

⁹⁶⁹ Since proportionality is inherent in the Convention jurisprudence and not in English courts, it is considered as developing in the local scene. See Halsbury's Laws of England, 4th edn. Vol 1 (1) para 88.

⁹⁷⁰ Lester, A. The Human Rights Act 1998-Five Years On. (2004) 3 *EHRLR* 259, 265.

broadmindedness',⁹⁷¹ enables the use of an objective standard in order to justify interference with a Convention right. Though the standard is measured on a yardstick of a democratic society, the diversity of local values and conditions gives different emphasis on the requirement of necessity.

Proportionality does not provide any guidance on evaluative assessment of the relative weight to be given to different but competing fundamental rights. More fundamentally, proportionality only becomes salient when the question 'to override or not to override?' arises. It relies on the pressing social need in a democratic society to determine the victorious interest. It is not sufficient to prove that a right is only desirable in a society. There must exist a pressing social need in a society which makes the right really needed⁹⁷² and thus worthy of protection. The merits of the right in a democratic society enhance its values, which determine the weight in the process of balancing. This is made possible by way of deductive judgment of factual context. It makes proportionality as an alternative approach to resolve competing rights as it requires reasoned and proportionate arguments to justify the decision made.⁹⁷³

The ECtHR holds that the principle of proportionality as being particularly relevant in determining whether or not a restriction under Article 8 (2) is necessary in a democratic society. The notion of necessity co-exists with the requirement of a pressing social need. This allows some measure of protection extended to the rights. This also means that a right such as freedom of expression has already been privileged. The application of proportionality is to determine that interference with a Convention right is within the specified legitimate objective.⁹⁷⁴ It is regarded as the crux of fair balance exercise in the Convention jurisprudence.⁹⁷⁵

⁹⁷¹ *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49.

⁹⁷² Lord Griffiths in *Re An Inquiry under the Company Securities (Insider Trading) Act 1985* [1988] AC 660, 704.

⁹⁷³ Mullender, R. (2002) *Freedom of Expression and Competing Private Interests*. In Alder, J. General Principles of Constitutional and Administrative Law. Houndmills, 508.

⁹⁷⁴ Greer, S. Constitutionalizing Adjudication under the European Convention on Human Rights. (2003) 23 *OJLS* 405, 409.

⁹⁷⁵ Lord Lester and Pannick, D. (1999) *Human Rights and Practice*. London, para 3.09.

Proportionality as a mediating mechanism is developing in the English judicial system and the courts have considered it on several occasions⁹⁷⁶ including in judicial review proceedings.⁹⁷⁷ In relation to the balancing of freedom of expression and other rights, the approach has judicial support. Sedley LJ, for example, said that:

It replaces an elastic concept with which political scientists are more at home than lawyers with a structured inquiry. Does the measure meet a recognised and pressing social need? Does it negate the primary right or restrict it more than necessary? Are the reasons given for it logical?⁹⁷⁸

Lord Goff in *Attorney-General v Guardian (No 2)* recognised the application of proportionality when he said that ‘I have no reason to believe that English law, as applied in the courts, leads to any different conclusion.’⁹⁷⁹ In addition, Lord Bingham in *McCartan Turkington Breen v Times Newspapers Ltd*⁹⁸⁰ whilst stressing the cardinal importance of press freedom expressed that any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction.

Proportionality serves as a vehicle for the courts to conduct a balancing act.⁹⁸¹ It affords a means by which to structure judicial discretion or the exercise of judgment.⁹⁸² The court in *Douglas v Hello! Ltd* adopts this when Sedley LJ treated freedom of expression and right of privacy on an equal term as both are qualified by each other. He rejected the notion that freedom of expression under Article 10 (1) acquires a presumptive priority over other rights. He said that:

⁹⁷⁶ See *Derbyshire County Council v Times Newspaper* [1992] QB 770, 817 and *Rantzen v Mirror Group Newspapers Ltd* [1994] QB 670, 692.

⁹⁷⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410. *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, 750. *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26.

⁹⁷⁸ *Douglas v Hello! Ltd* [2001] 1 QB 967, para 137.

⁹⁷⁹ [1990] 1 AC 109, 283.

⁹⁸⁰ [2001] 2 AC 277, 291. See also per Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 200.

⁹⁸¹ Feldman, D. (2002) *Civil Liberties and Human Rights in England and Wales*. Oxford, 57.

⁹⁸² See Mullender, R. Theorizing the Third Way: Qualified Consequentialism, the Proportionality Principle, and the New Social Democracy. (2000) 27 *J of Law and Society* 493, 503.

Neither element is a trump card. They will be articulated by the principles of legality and proportionality, which, as always, constitute the mechanism by which the court reaches its conclusion on countervailing or qualified rights.⁹⁸³

The court in *Campbell v MGN*⁹⁸⁴ follows the approach. In this case, the tests, which the court must apply, are whether publication of the material pursues a legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy. Where the values under Articles 8 and 10 are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. In Campbell's case, freedom of expression is invoked to justify limitation on privacy-related protection. In this regard, proportionality principle is used to guide the exercise of discretion in the decision making process.

The normative evaluation through the pressing social needs influences the decision in making one right prevails over the other. For instance, the interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment. It is undemocratic to give primacy to collective goals of a right in making decision because it will suppress the fundamental characteristic of an individual's right in a democratic society. If the interests of a single individual are balanced against a whole social policy, the individual will almost certainly be at the losing side.

This way of balancing is disadvantageous to individual's interests because more widely shared communitarian interests can easily outweigh the interests of dissenting individuals or groups. On the other hand, it is also indefensible for individual's right to override the collective goals because it denies the need of the public at large. The society should determine matters pertaining to social goals in accordance with its values, particularities and social fabric. The society appears to be a better forum to decide its own needs. To

⁹⁸³ [2001] QB 967, 1005.

⁹⁸⁴ [2004] UKHL 22, para 20.

ignore this would raise an objection that judges apply their own views, which amount to an encroachment of democratic process.⁹⁸⁵

In addition, there is also a question of ascertaining objective standards of democratic necessity. The diversity of such standard may be illustrated by *Bowman v UK*⁹⁸⁶ where the ECtHR held that the statutory limit on publications in favour of a particular candidate in the period just before an election was disproportionate and so unnecessary in a democratic society. The court in *Hatton v United Kingdom*⁹⁸⁷ also implied that the standard differs when it ruled that ‘In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy maker should be given special weight.’ The case involved a complaint under Article 8 about environmental pollution by aircraft noise resulting from night flights at Heathrow Airport. The court considered a wide margin of appreciation in implementing social and economic policies that suit local needs and conditions. Moreover, different standard may appear in cases involving freedom of expression where the criminalisation of religious hatred under the Anti-Terrorism, Security and Crime Act reflects the necessity of the democratic society in the UK but may not be so under the Convention jurisprudence that jealously protects freedom of expression.

In the context of European jurisprudence, the margin of appreciation allows the states to apply local particularities in term of cultures, norms and values. This doctrine recognises that different contracting states have different cultural and societal standards. The national authorities are recognised to be the best arbiters of what measures are suitable or necessary considering the local circumstances. In view of this, the ECtHR considers that the domestic authorities of those states are better placed than an international court to determine the propriety of particular measures. The ECtHR in *Wingrove v UK*⁹⁸⁸ pronounces this when the Court said:

⁹⁸⁵ McHarg, A. Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights. (1999) 62 *MLR* 671.

⁹⁸⁶ (1998) 26 EHRR 1.

⁹⁸⁷ (2003) Application No 36022/97, paragraph 97.

⁹⁸⁸ (1996) 24 EHRR 1.

Whereas there is little scope under article 10(2) of the Convention for restrictions on political speech or on debate of questions of public interest, a wider margin of appreciation is generally available to the contracting states when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.⁹⁸⁹

This indicates that the national states are at a greater liberty to choose between more or less liberal or conservative regimes. Therefore, the scope of the margin of appreciation depends at least in part upon the court's judgment of the extent to which, giving full weight to local culture and practice, there may in principle be a range of different views and approaches relating to the matter in hand. The question that arises in each case is whether and to what extent it is proportionate to restrict one Convention right in order to protect another. The application of margin of appreciation provides different answers as the emphasis at national state level varies. For instance, recognition of right of privacy is explicitly strong in ECtHR but uncertain in the UK.

Alder⁹⁹⁰ argues that proportionality cannot avoid subjective choice. The choice between competing interests that fulfill the requirement of pressing social needs cannot rationally be made.⁹⁹¹ The courts must decide on the basis of valued judgment where one right is prioritised over the other. For instance, in *Re S (a Child)*⁹⁹² the House of Lords ruled that the freedom of the press to report the proceedings of a criminal trial required that newspapers would not be restrained from publishing the identity of a defendant in order to protect the privacy of the defendant's child who was not involved in the proceedings. Lord Steyn reasoned that the interference with Article 8 right, however distressing for the child, was not of the same order when compared with cases of juveniles who were directly involved in criminal trials. Inhibition on reporting criminal trials would occur if injunctions were to be granted. Consequently, informed debate about criminal justice would suffer.

⁹⁸⁹ Ibid, 30.

⁹⁹⁰ Alder, J. (2002) *General Principles of Constitutional and Administrative Law*. Houndmills:448-49.

⁹⁹¹ Proportionality is an approach with no fixed standard. The pressing social need requirement creates variable of subjective nature. See Leigh, I. Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg. (2002) *PL* 265, 278.

⁹⁹² [2004] UKHL

On the contrary, the court in *Mary Bell*⁹⁹³ case granted a lifetime injunction prohibiting disclosure of the children's identities or whereabouts. The court took into account; *inter alia*, the serious risk of potential harassment, vilification and ostracism, and the possibility of physical harm.⁹⁹⁴ Prohibition on disclosure of identity also has been given by the court in *Re C (No 2)*⁹⁹⁵ particularly to avoid adding further to the stress that the case had placed on C's carers, other hospital staff and the hospital itself. The court found that the related prohibition on soliciting information from carers and staff was needed to prevent media encampment at the hospital as well as a more vaguely stated threat. It could be argued that the value judgment for imposing prohibition on disclosure in this case appears to be less well founded.⁹⁹⁶

In addition, in the event that a clash between privacy and press freedom involves medical data, privacy is likely to take priority. This is because of the high importance that the domestic courts and the ECtHR attach to the protection of medical confidentiality.⁹⁹⁷ The importance of protecting the record is stressed in *Ashworth Hospital Authority v MGN Ltd*⁹⁹⁸ when the House of Lords upheld the Court of Appeal's decision in view of the need for the integrity of a health authority's records to be protected and so as to identify and punish the informant. Thus, an order requiring MGN to disclose the source from which it had obtained the records was appropriate.

In order to strike an appropriate balance between two sets of rights, Phillipson suggests the 'rights reversed' method.⁹⁹⁹ He argued that instead of treating Article 8 merely as an exception to Article 10, which is a one-way consideration, the courts should also consider from the standpoint of Article 8. Both articles are qualified by each other. There is a parallel test, which requires the courts to focus not only on interference with freedom of

⁹⁹³ *X (formerly known as Merry Bell) & Y v News Group Newspapers & Ors* [2003] EWCH 1101.

⁹⁹⁴ The effect of mental state is important under article 8. See *X v Netherlands* (1985) 8 EHRR 235, *Botta v Italy* (1998) 26 EHRR 241 and *Bensaid v UK* (2001) 33 EHRR 10.

⁹⁹⁵ [1990] Fam 39.

⁹⁹⁶ Cram, I. *Minors' Privacy, Free Speech and the Courts*. (1997) *PL* 410, 419.

⁹⁹⁷ *Mersey Care NHS Trust v Ackroyd* [2003] EWCA 663. *Z v Finland* (1997) 25 EHRR 371, para 95.

⁹⁹⁸ [2003] 1 WLR 2033.

⁹⁹⁹ Phillipson, G. *Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act* (2003) 66 *MLR* 726, 752.

expression under Article 10 but also with privacy under Article 8.¹⁰⁰⁰ On the same premise, Tomlinson and Rogers suggest ‘parallel analysis’ where a descending scale exists in favour of freedom of expression as well as privacy interests.¹⁰⁰¹ They argued that the more valuable the form of expression is, the more difficult it is to justify the restriction. In parallel to this, the more intimate the information the more difficult it is to justify an interference with Article 8.

This approach is considered as the correct approach in cases dealing with identity of a minor.¹⁰⁰² It allows the media the maximum freedom to publish whilst rendering maximum protection to the children. This is possible by allowing the media to publish without disclosing the identity of the children. The court in *Re M and N*¹⁰⁰³ decided to set aside the injunction restraining all publicity about the children involved but imposed anonymity. This method of balancing does not give emphasis on one particular right. Instead, the importance of both rights counter balances each other. But what make one right outstanding depends on the factual context in each case. This is where the courts have to decide between protection of private interest and upholding the general interest of the community.

There are various normative considerations that influence the courts in deciding which right should prevail. A decision based on proportionality involves a degree of deference where the need of a democratic society is taken into account. From a democracy perspective, public’s interest of the majority does not always prevail but individual’s interests may occasionally be suppressed to give way to the interests of majority.¹⁰⁰⁴ However, Lester argues that the argument based on the democratic imperative prone to a form of majoritarianism.¹⁰⁰⁵ Perhaps the remark made by Lord Hoffman in *Alconbury*¹⁰⁰⁶ case presents the pragmatic resolution. He said:

¹⁰⁰⁰ The court in *Re S (a child)* [2003] WLR 1425 concurred with Sedley LJ remarked in *Douglas v Hello! Ltd* [2001] 2 All ER 289 that neither is a trump card.

¹⁰⁰¹ Tomlinson, H. and Rogers, H. Privacy injunctions: Reviewing the Approach. (2003) 153 NLJ 818.

¹⁰⁰² Fenwick, H. Clashing Rights, the Welfare of the Child and the Human Rights Act. (2004) 67 MLR 889.

¹⁰⁰³ [1990] 1 All ER 205.

¹⁰⁰⁴ *Chassagnou and others v France* para 12. *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38, para 63.

¹⁰⁰⁵ Lester, A. The Human Rights Act 1998-Five Years On. (2004) 3 EHRLR 259, 266.

¹⁰⁰⁶ *R v Ex p Holding and Barnes Plc* [2001] UKHL 23.

There is no conflict between human rights and the democratic principle. Respect for human rights requires that certain basic rights of individuals should not be capable in any circumstances of being overridden by the majority, even if they think that the public interest so requires. Other rights should be capable of being overridden only in very restricted circumstances. These are rights that belong to individuals simply by virtue of their humanity, independently of any utilitarian calculation.¹⁰⁰⁷

The existence of several Acts such as the Anti-Social Behaviour Act 2003, the Harassment Act 1997, the Anti-Terrorism, Crime and Security Act 2001 illustrates the point that an individual's freedom though revered by liberal society could be restricted to uphold the wider interest of plural society in maintaining a peaceful and harmonious social life. There is undoubtedly a public interest in freedom of expression but other interests such as reputational interest, welfare of children, proprietary interest and privacy interest may sometimes override this.

The question is on what basis do the courts ground their decision in assessing the diverse values of competing rights? Perhaps burdens of judgment as propounded by Rawls could help to direct the courts in making the hard and controversial judgment.¹⁰⁰⁸ Rawls argument relates to the sources of disagreement between reasonable persons. The courts encounter the burdens in finding a resolution on the basis of fair terms of the rights. Furthermore, the requirement of compatibility between the burdens and the reasonableness of the parties may fit in the framework of proportionality principle. This is vital so that the principle of proportionality may not only recognise both rights but most importantly does not suppress other competing right.

The exercise of proportionality as contemplated above would at least avoid the outcome of resolving competing interests by way of preference, taste, biasness or prejudice. Balancing act according to proportionality perspective is not about giving edge to community interests; it is to enable fair allocation of benefit and burdens within society based on the ideal of distributive justice.¹⁰⁰⁹ In this regard, it can be said that the basic

¹⁰⁰⁷ Ibid, para 70.

¹⁰⁰⁸ Rawls, J. (1993) *Political Liberalism*. Columbia University Press.

¹⁰⁰⁹ Walzer, M. (1994) *Thick and Thin: Moral Argument at Home and Abroad*. University of Notre Dame Press, 21.

concept of distributive justice informs the proportionality principle. This is so when distributive justice relates to the outcomes of decision-making of who benefits and who bears the costs. In relation to competing interests of the Convention rights, the ECtHR jurisprudence requires fair balance where ‘judges stake out positions that are intended adequately to accommodate the interests of all those affected by the law’s operations.’¹⁰¹⁰

Privacy and freedom of expression might be described as social primary goods. Article 8 and 10 of the Convention set the scheme that is receptive to the notion of distributive justice. Both articles contain exceptions, which permit interference with the protected right. Even though freedom of expression is protected by Article 10 but under certain circumstances, the right can be curtailed by another beneficial countervailing interest such as privacy. It may not be plausible to claim the benefit of freedom of expression without considering the importance of privacy in a society. However, it is necessary to justify that preserving privacy is more imperative than maintaining freedom of expression or *vice versa*. The scheme is workable in spreading the benefit of rights as well as the burden of proving exception across society.

Nevertheless, a resolution by way of proportionality is not free from controversy. The outcome of the process is arrived at through balancing where the courts have to make a decision between the benefit of the right and the justification of the exception. If the courts decide to uphold individual’s interest, they may be criticised of sidelining the public’s interest in freedom of expression. The role of the courts in this situation seems to be limited to giving effect of democratic view of society.

Presumptive priority or presumptive equality could not avoid the difficulty of balancing exercise in resolving competing rights between freedom of expression and privacy. Priority of one right over the other is determined on the basis of relative weights given to both privacy and free expression. This is ascertained by relying on the assessment of normative judgment, which is a subjective judicial decision-making. This method is exercisable on the presumption that a common decisive scale is available to assess the competing rights of commensurable value on the basis of relative weights. The

¹⁰¹⁰ Mullender, R. Tort, Human Rights, and Common Law Culture. (2003) 23 *OJLS* 301.

application of balancing approach to reconcile the competing rights is misleading. This is because both rights protect different interests and seek to serve opposite objectives. Freedom of expression allows dissemination of information, either favourable or unfavourable, to flow within society. On the contrary, privacy seeks to retain personal private information from the gaze of public knowledge.

The significance of preserving the rights in a society requires both to be treated distinctively but equally. The plurality of values that elevate the characteristic and status of rights make it impossible for them to be ranked against one another.¹⁰¹¹ The courts for the purpose of giving weight value the merits of the rights. In doing so the courts are guided by certain vague standard such as public interest. The difficulty in weighing different nature of rights raises a question as to the application of balancing approach in case of incommensurable rights. For balancing to be of practical utility it must, therefore, be demonstrated that the types of considerations to be balanced are in some way commensurable.¹⁰¹²

6.3 INCOMMENSURABILITY AND UNCOMBINABILITY

The absence of a single scale of value enabling a precise measurement of competing interests leads to the notion of incommensurability.¹⁰¹³ Raz argues that incommensurability occurs when it is neither true, that one is better than the other nor are they of equal value.¹⁰¹⁴ On this account, it may be possible to discern that incommensurability does not entertain the notion of presumptive priority nor presumptive equality. Incommensurability exists if we are unable to evaluate between two interests, in terms of their relation to one another, and this is because there is no means or scale of evaluation of them.¹⁰¹⁵

However, the existence of incommensurables should not be understood as a reflection of our inability to make fine discriminations between divergent ways of life. Rather, there

¹⁰¹¹ Galston, W. Value Pluralism and Liberal Political Theory. (1999) 93 *APSR* 769, 770.

¹⁰¹² Campbell, T. and Goldberg, D. (1986) *Human Rights: From Rhetoric to Reality*. London, Blackwell.

¹⁰¹³ Chang, R. (1997) *Incommensurability, Incomparability and Practical Reason*. Cambridge, 2.

¹⁰¹⁴ Raz, J. (1997) *The Morality of Freedom*. Oxford, 322.

¹⁰¹⁵ Glenn, P. Are Legal Traditions Incommensurable? (2001) 49 *Am. J. Comp. L.* 133.

are no comparisons to be made because there is no common metric in terms of which values can be graded. In this regard, incommensurables reflect the plurality aspect of human life. The rights are irreducible and differ on their standards of evaluation. As such, they may be distinguished according to their distinct standards and goals. For instance, the need to protect security which requires the citizens to prove identification may be incomparable to the value of a democratic society in the right to be let alone. Moreover, freedom of expression is distinctively about disclosure of information to the world at large as oppose to privacy, which concerns retention of private facts. The variability of purposes both seek to protect makes the rights as incommensurables, standing on different equations that make ordinal ranking as inappropriate. Thus, elevation of a particular right does not affect or reduces the value of the other.

Incommensurability requires distinction of competing interests, as it is not possible to compromise them. It makes them uncombinable in terms and standard. Gray argues that 'Ultimate values are objective and knowable, but they are many, they often come into conflict with one another and are uncombinable in a single human being or a single society andin many of such conflicts there is no overarching standard whereby the competing claims of such ultimate values are rationally arbitrable.'¹⁰¹⁶ There is no single scale of value that can precisely measure the rights. Unlike balancing which assumes a common scale to accommodate the competing rights, incommensurability denies the existence of such a scale. The diversity of incommensurables such as freedom of expression and privacy renders assessment on a common measure as unachievable.

What is the resolution then when faced with two incommensurables? In contrast with balancing exercise, which relies on relative weight to determine the outcome, incommensurability ensures a pragmatic resolution. It does not involve comparative evaluation between the less and more values or concerning individual and community interests. Decision on competing interests is not a matter of evaluative consideration on a balancing scale but rather a matter of choice that simply needs to be made. Building on a democratic framework, the people are empowered with a capacity to make a choice, which reflects their needs. Raz makes the point by saying that "we are in a sense free to

¹⁰¹⁶ Gray, J. (1993) *Post-Liberalism: Studies in Political Thought*. New York, 65.

choose which course to follow."¹⁰¹⁷ The people should be entrusted with the choice involving diverse kinds of valuation.¹⁰¹⁸ A resolution of clash between incommensurable values is unachievable through accommodative effort. Instead, it is a tragic choice as described by Isaiah Berlin.¹⁰¹⁹ Values in human life are heterogeneous not neatly rank-ordered, and cannot be combined into a single harmonious package. To live well is to choose a good life, which inevitably means excluding other worthy possibilities. The philosophical justification for social pluralism is the diversity of legitimate human goods.¹⁰²⁰ On the premise of this view, a brute stand is necessary to resolve the clash in a practical manner.

There is no objective means of measuring the value of different interests between freedom of expression and privacy. It is tragic that there will be a loss to society where one of the fundamental rights has to be tolerated to give way to the other. This does not necessarily make the chosen interest gain preferential status permanently nor reducing the fundamental character of the other. Though the impact is regrettable¹⁰²¹ but it provides an appropriate accommodation of competing rights within a democratic framework. For instance, in *R (Prolife Alliance) v BBC*¹⁰²², the issue is about the censorship of political speech. It concerns the question of what constraints may lawfully be imposed upon the choice of a registered political party as to the content of a party election broadcast to be transmitted on television on its behalf at the time of a general election. The House of Lords applied the standards laid down by Parliament, held that on the basis accepted by the claimant that party political broadcasts were subject to the same restriction on the transmission of offensive material as other programmes. There had been no ground for interfering with the decision of the BBC that the claimant's video should not be transmitted.

¹⁰¹⁷ Raz, J. (1997) *The Morality of Freedom*. Oxford, 334

¹⁰¹⁸ Sunstein, C. Incommensurability and Valuation in Law. (1994) 92 *Mich. L. Rev.* 779.

¹⁰¹⁹ Berlin, I. (1969) *Four Essays on Liberty*. London, Oxford University Press.

¹⁰²⁰ Galston, W. Who's a Liberal? (2001) *The Public Interest*, 416

¹⁰²¹ Galston, W. Value Pluralism and Liberal Political Theory. (1999) 93 *APSR* 769, 771.

¹⁰²² [2003] UKHL 23.

In relation to this, Alder argues that reconciliation under the notion of incommensurability should be tentative and provisional in nature.¹⁰²³ The perception that people have towards interests is changeable. The qualitative nature of values, which give primacy to interest in society, is susceptible to change. This is influenced by the climate of social, political and economic conditions in the society. The vicissitude of social and political life, thus, influences the emphasis in society. For instance, the horrendous impact of the September 11 2001 tragedy in the United States of America illustrates the impermanent status of values. The tragedy alters the landscape of domestic and international affairs. It fortifies the need to strengthen national security, which makes protection of the interests of the people as paramount. This is a matter of a brute choice that needs determination. On this basis, perhaps the existence of the Anti-Terrorism Act in the UK and the Internal Security Act in Malaysia, which limit personal liberty to a certain extent, is justifiable. The renewed priority compromises other aspects of life such as personal liberty, freedom of expression and freedom of movement. It may be justifiable to be pro-active in this sort of condition in order to prevent terrorism by restricting freedom of expression or privacy. As such, it is difficult to maintain that a democratic legal system can rationally provide coherent scheme of values. Therefore, permanent adherence to any particular value or interest does not reflect the pragmatic characteristic of a democratic framework in this sense.

The choice between incommensurable competing interests may not be difficult and is less controversial in case of exceptional circumstances. For instance, the necessity of protecting national security against terrorism permits restrictions on individual rights. The introduction of Anti-Terrorism, Security and Crime Act, though inhibits personal liberty with regard to fair trial, is deemed to be necessary as a pre-emptive action to avoid harm to the nation. This is a collective decision democratically acted upon. The priority accorded to security interest is being proclaimed and coercively imposed as the overriding interest in society. Nevertheless, a detention without trial provided by the Act accords a vast discretionary power to the executive that may lead to abuse of power. The law was introduced in accordance with a democratic framework peculiar to the UK,

¹⁰²³ Alder, J. Dissents in Courts of Last Resort: Tragic Choice? (2000) 20(2) *OJLS* 221.

which embraces the principle of parliamentary supremacy. It is the choice deemed fit by the government and can only be proven wrong by the majority voice through ballot box. In this context, there is a sense of expediency exercised by the UK government that is similar in the case of Malaysia. In 2004, the House of Lords ruled that the Anti-Terrorism, Security and Crime Act 2001 is incompatible with Articles 5 and 14 of the European Convention insofar as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status.¹⁰²⁴

Similarly, the competing interests with regard to the proposed Identity Card Bill by the UK government may be reconciled from the incommensurability perspective. Arguably, the interest in privacy and security are incommensurable. Though it is valid to argue that the card leads to the erosion of personal liberty as far as personal information is concerned, the management of personal information at national level for security purposes is equally important. The erosion occurs at the operational stage relating to the effectiveness in managing database. Considering the present social climate on issues such as asylum seekers, illegal immigrants and social benefit fraudsters, identity card is deemed as a necessary apparatus and instrumentally serves as a preventive measure for the betterment of life of the people.

Another area where incommensurability is a coherent resolution is the protection of individuals who are seriously at risk. The court in *Carr v News Group Newspapers Ltd & Others* concludes this when the court granted an injunction to protect the identity of the individual concerned from being disclosed.¹⁰²⁵ The injunction was granted on the evidence that there were death threats that the police believed to be credible. In addition, protection of welfare of a child may also override the interest in freedom of expression. The application of overriding interests under these exceptional circumstances is dictated by the need of a democratic society. The requirement of necessity in a democratic society and pressing social needs shows that certain values are recognised as having

¹⁰²⁴ *A (FC) and others v Secretary of State for the Home Department* [2004] UKHL.

¹⁰²⁵ Similar injunction was also given by the court in *Venables & Thompson v News Group Newspapers Ltd* [2001] 1 All ER 908 and *X & Anor v O'Brien & Ors* [2003] EWHC 1101.

determinative influence in deciding primary interests. Therefore, it may be unjustifiable to give primacy to an interest that is less important from the society's point of view. Under democracy where the voice of majority prevails, the interest of the public as a whole is deemed paramount. It is a democratic way to preserve this interest whilst sacrificing interest that only serves minority. But this does not necessarily create an overarching principle for majority rule in all circumstances. Hoffman J in *Re Goodwin*¹⁰²⁶ explained the democratic way in dealing with two important public interests:

The conflict is between two public interests...the free availability of information and the fair administration of justice. The administration of justice is a matter of high public interest...In a democratic society these differences of opinion (which public interests are more important) are decided by the elected representatives of the people. Parliament decides which public interest should have priority and, while that remains the law, the people accept and obey what Parliament has decided.¹⁰²⁷

The absence of a common standard capable of resolving the incommensurables implies the dissatisfactory of relying on relative values to determine the outcome. This is why balancing exercise is doubtful in providing a satisfactory resolution for incommensurable interests. It is difficult to balance between two seemingly conflicting interests, and solutions are often imperfect. Infringement can only be justified in cases of overriding necessity to prevent demonstrable harm to other citizens.¹⁰²⁸

It could arguably be said that the interest in free speech and privacy are not susceptible under harmonisation scheme as they are also uncombinable. In this situation, the prevalence need of the people should lead the course in determining between the competing interests. The people are seen to be the appropriate party to determine the priority of their own interests. Since the matter will affect their individual rights, a degree of deference should be accorded to them under the aegis of a democratic framework. In other words, the issue should be decided by making a choice of preference determinable in accordance with the accepted structure through the representative system. It is not a

¹⁰²⁶ [1990] 1 All ER 608.

¹⁰²⁷ Ibid, 615.

¹⁰²⁸ Robertson and Nicol argue that this should be the new test replacing balancing test. Their argument based on the primacy of free expression in article 10 which is a common standard by which all restraints on publication may be judged. See Robertson, G. and Nicol, A. (2002) *Media Law*. London, x.

question of forming a relative judgment in order to make a decision but simply exercising the ability to make a choice between the incommensurables.

Decisions through democratic process are the outcome of participative deliberation on a voluntary basis. Such a process may give way for individual's interests to override community's interests on a contextual basis. In a functioning democracy, democratic processes and structures serve to manage conflict in the direction of tolerance and compromise. However, there are circumstances whereby compromise is indefensible such as in case of abortion or right to die. Therefore, in a situation where there is a clash between individual's interests and community's interests, the latter do not always prevail.

There is a flaw in determining the prevalent interest based on the size of recipient. The larger the size, in this case the public, does not mean the better justice will be served. Sometimes the interest of a minority public is important in preserving peace and order such as in case of racial and religious hatred under the Anti-Terrorism, Security and Crime Act 2001. In addition, to accept community interests as the overriding interests may lead to the existence of trump factor. The effect is that it suppresses the individual's interests whenever a clash takes place. This may not attune to the pragmatic aspect of a democratic process, which gives space for both kinds of interests under the principle of distributive judgment. Strict adherence to any particular values or interests is an alien concept in a democratic framework.¹⁰²⁹

The Human Rights Act 1998 may provide the platform for accommodative approach between two fundamental interests in a democratic society such as freedom of the press, representing public interest in the right to be informed, and privacy of individual. Though section 12 (2) requires a particular regard to freedom of expression, at the same time it permits the exclusion of the right for the purpose of protecting individual's interest such as reputation or confidence. The mediation exercise helps to maintain the importance of both rights without degrading each other.

¹⁰²⁹Privileging any particular values permanently is against democratic principles because it narrows the possibility of change. See Alder, J. Dissents in Courts of Last Resort: Tragic Choices? (2000) 20(2) *OJLS* 221, 222.

Perhaps it is appropriate to reconcile the competing interests by considering the intrinsic nature and the relevant peripheral considerations informed by qualified deontology.¹⁰³⁰ In this context, free speech and privacy under Article 10 and 8 respectively, can be regarded as presupposing the intrinsic value of the autonomy that both seek to protect. Both countervail each other and can be overridden if it can be shown that protecting a particular interest at the expense of another is necessary in a functioning democratic society.

6.4 CONCLUSION

To apply a general balancing exercise involving competing interests is misleading. There exists an imbalance in the approach where the scale tilts in favour of free expression in term of weight. Since privacy and freedom of expression represent distinct and different interests, balancing is unsatisfactory due to lack of a single common scale. Reconciliation could be found in the doctrine of proportionality that embodies a basic principle of fairness.

The application of distributive justice could help to inform value judgements in reconciling the competing interests under this approach. Perhaps balancing is possible between competing but combinable interests such as those under the aegis of International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966 of the United Nation, respectively.¹⁰³¹ Although judicial recognition of the primacy of freedom of expression over privacy is divisive, but the cases seem to indicate that great emphasis is given by the English courts¹⁰³² and ECtHR¹⁰³³ to freedom of expression especially with regard to political expression.

¹⁰³⁰ Mullender, R. Privacy, Paedophilia and the European Convention on Human Rights: A Deontological Approach. (1998) *PL* 384.

¹⁰³¹ Unlike Malaysia, the UK government disagree with the distinction between civil and political rights on one hand and economic, social and cultural rights on the other. See Human Rights: Annual Report 2003:144. CM 5967.

¹⁰³² *AG v Guardian Newspapers Ltd* (No 2) [1988] 3 All ER 543 and *R v Secretary of State, ex p Simms* [1999] 3 All ER 400.

¹⁰³³ *Sunday Times v UK* (1980) 2 EHRR 245, *Jersild v Denmark* (1995) 19 EHRR 1, *Prager and Oberchlik v Austria* (1996) 21 EHRR 1, *Bladet Tromsø v Norway* (2000) 29 EHRR 125, *Bergens Tidende v Norway* (2001) 31 EHRR 16 and *Arslan v Turkey* (2001) 31 EHRR 9.

CHAPTER 7

THE PRESS AND PROTECTION OF PRIVACY IN MALAYSIA: A WAY FORWARD

7.0 INTRODUCTION

Malaysia adopts democratic principles.¹⁰³⁴ This is manifested by the thrust of constitutional democracy where the citizens have the right to participate in shaping the nation. The existence of diversity in terms of race, culture, religion and language continues to influence the application of relative democratic values at the national level. However, the relativism that places great emphasis on local values does not resonant well with the concept of universality of human rights under the United Nation (UN).

The idea of universality of human rights as subscribed by most of the Western liberal countries such as the UK is an intricate application in Malaysia. The intricacy is due to the social and political diversity, which is peculiar to the country. This creates divergence in the practice of human rights that may challenge the coherency of the idea of universalism. This is obvious when Malaysia recognises a dual judicial system where Islamic law, with limited application to the Muslims, is being implemented alongside with secular common law system. As such, there are areas where the perception on certain matters is different. For example, being in close proximity with a member of the opposite sex, unmarried, is not only a highly immoral conduct but also a criminal offence.¹⁰³⁵ This is absence in the Western liberal societies such as the UK. Another example that may question the coherency of universalism in Malaysia is the absence of a right to leave one's religion particularly in case of the Muslims, which is in contravention with Article 18 of the ICCPR.

The question is: 'does that make Malaysia undemocratic from the Western's democracy point of view?' The writer argues that there is a flaw in one version of democracy that

¹⁰³⁴ Article 119 of the Federal Constitution ensures the citizens their right to vote and to elect the government of their choice.

¹⁰³⁵ Section 27 of the *Syariah Criminal Offences (Federal Territories) Act 1997*.

suits all. This is justifiable with regard to the fact that local needs and requirements create divergence in exercising democratic principles in various parts of jurisdictions. In this regard, Walzer argues that moral maximalism gives expression to particularities of society laden with relativist impulse.¹⁰³⁶ Since societies have culture, customary practices and values 'there is no singular human way of having them.'¹⁰³⁷ For instance, the diversity in judicial system, with the application of the Islamic law in Malaysia, creates incommensurables that have no resemblance to the worldview of the Western liberal democracy. Thus, there exists plurality in practicing democratic principles that is acknowledged widely. This is illustrated in the different emphasis that appears in the joint Declaration and Programme of Action in Vienna 1993 and with the adopted stand by Asian governments at their United Nations regional consultation in Bangkok 1993.

A common factor for the spectrum of perception on human rights is attributed to cultures, norms and values. Faruqi argues that cultural differences are an anthropological fact, whereas human rights are about moral and not a cultural doctrine.¹⁰³⁸ Universal formulations of human rights ignore the fact that human societies evolve on particularities according to their own needs and demands. Furthermore, societies at times define some of their core values in retrospect to their very self-understanding. For example, in relation to freedom of expression, blasphemous expression against Islam is an offence in Malaysia but it is not so in the UK.

Arguably, it is indefensible to denounce local particularities in applying universal principle at the national level. The existence of plurality of values and diversity of views creates a divergence of perception on rights and wrongs. For instance, the application of death sentence is a subject of different perception on right to life in Malaysia and the UK. As such the application of margin of appreciation, which is the touchstone under the ECHR, points out that the universality of human rights needs adjustment to suit local conditions. For example, in relation to protection of reputation, which is universally recognised, the question of defamatory statement depends on peculiarities and values of

¹⁰³⁶ Walzer, M. (1994) *Thick and Thin: Moral Argument at Home and Abroad*. Notre Dame, x.

¹⁰³⁷ *ibid*, 8.

¹⁰³⁸ Faruqi, S. (1994) *A Comparative Constitutional Approach to Human Rights*. Paper presented at *Bengkel Human Rights: An Inventory of Propositions*, University Kebangsaan Malaysia.

the society concerned. Therefore, whether a statement tends to lower a person in the estimation of the right-thinking members of society in Malaysia may not be the same in the UK. This is illustrated in the case of *Hasnul Bin Abdul Hadi v Bulat Bin Mohamed & Anor*¹⁰³⁹ where the court held that to call a man 'Abu Jahal' is a defamatory, and publication of the words is actionable *per se*. Ibrahim J in his judgment said that:

As the description of plaintiff as "Abu Jahal" was qualified by the reason that it was on account of his very big lies it would appear to me that the words used were likely to be understood by the ordinary right-thinking and reasonable Malay of ordinary intelligence with the ordinary man's general knowledge of the Islamic religion and experience of worldly affairs to mean that plaintiff was a very big liar and an irresponsible person just as "Abu Jahal" was...¹⁰⁴⁰

The particularity as illustrated by the above case raises the issue of approach to protect fundamental freedom most appropriately. In this context, there are three approaches of model for Malaysia to adopt in practicing human rights at the national level namely, universalism, relativism and reflective equilibrium.¹⁰⁴¹ The writer argues that the third approach may suit Malaysia considering the distinctiveness of its socio-political and economic background. The approach stresses on discrimination in absorbing external values, yet at the same time avoid blanket rejection and extremes of relativism. The next discussion will focus on the nature and suitability of the above-mentioned approaches in relation to Malaysia.

7.1 UNIVERSALISM AND TOP DOWN APPROACH

Malaysia subscribes to the particularities of local condition in justifying restrictions on individual rights. The practice of individual rights as perceived under the international documents such as UNCHR are regarded as an effort to impose the Western ideals of human rights. The Western liberal approach, which based its account of rights on individualism, is in contradiction with Asian values that stress on communitarianism.¹⁰⁴² With regard to freedom of expression in Malaysia, Hashim argues that 'When balanced

¹⁰³⁹ (1978) 1 MLJ 75.

¹⁰⁴⁰ Ibid, 77

¹⁰⁴¹ See Mullender, R. Human Rights: Universalism and Cultural Relativism. (2003) 6 *CRISPP* 70.

¹⁰⁴² Faruqi, S. Human Rights, Globalisation and the Asian Economic Crisis. (1999) 28 *INSAF* 39, 54.

against the public's right to know, the rights of the individual must always be balanced against the needs of the community.'¹⁰⁴³

The decadence of social fabric under the concept of individualism is perceived as a failure of the Western liberal approach. This is capitalised to justify that the West is not a good model for the Asian societies to follow suit. On this account, any effort to introduce by way of transplantation of a Western concept of freedom would face criticism and rejection.¹⁰⁴⁴ Reliance on international instruments on rights and freedom such as UDHR and ICCPR by the West to introduce freedom and democracy is regarded as an attempt to impose alien norms and values. In this context, Yasuaki argues that the colonial past endured by most of the Asian societies has made them sceptical and critical of western concept.¹⁰⁴⁵ The propagation of rights and freedom by the colonial governments under the concept of humanity, civilisation and human rights 'looks like nothing more than another beautiful slogan by which great powers rationalize their interventionist policies.'¹⁰⁴⁶

On the other hand, the sentiment of sceptical view of western human rights is criticised as an attempt to gain popular support at the national level especially to maintain political power. The capitalisation of the sentiment of West-East dichotomy is to repel foreign intervention for political gain. The human rights such as freedom of expression and privacy are not confined within local boundaries. The exercise of the rights is by no mean associated to any geographical area as the privilege of the developed countries. The rights are inalienable to human beings regardless of nationality.

Freedom to speak up against injustice, corruption, and abuse of power is a right of a person in any democratic society. Therefore, there is a fallacy in the view that there is a difference between the rights as practice by the West and by those in Malaysia. Notably, the rights are a constituent part of a democratic society associated to the people. The real

¹⁰⁴³ Hashim, H. Freedom of Speech, Communication and the Press. (2003) *MLJ*.
<http://www.mlj.com.my/free/articles/harunhashim.htm> (Retrieved 10 June 2004)

¹⁰⁴⁴ Bakar, O. Asian Values or Universal Values Championed by Asia? Implications for East-West Understanding. (1998) 8 (2) *Social Semiotics* 169.

¹⁰⁴⁵ Yasuaki, O. (1999) *Toward an Intercivilizational Approach to Human Rights*. In Bauer, J. and Bell, D. (ed.) *The East Asian Challenge for Human Rights*. Cambridge, 103.

¹⁰⁴⁶ *Ibid*, 105.

issue is not the distinction of the nature of the rights but the extent of the exercise of the right. It is acceptable to say that there is a distinction between the practice of human rights in the West and in the East. This is due to the application of the rights in the domestic context. The concept that the rights convey is universal but the application is subject to local suitability. Needless to say, the plurality in term of cultures and values requires adaptation and adjustment of the rights in accordance with the local conditions.

In this regard, the top down approach where the rights are applied as a matter of principle regardless of the plurality of the local conditions may not be appropriate in case of Malaysia. This leads to a question whether local particularities must be given priority in applying universal human rights principles such as expression and privacy.

7.2 LOCAL PARTICULARITIES AND BOTTOM-UP APPROACH

The question of diversity in the human rights discourse threatened the coherency of the idea of universality. Moreover, the conflicts of values that exist at transnational level create complexities in the universal language of human rights. Thus, local perspective is vital in determining the scope of human rights.

The bottom-up approach on Mullender's account gives expression to local perspectives and local practices.¹⁰⁴⁷ In Malaysian context, religious principles play an important role particularly in the Muslims' social life. The federal Constitution expressly stated that Islam is the official religion.¹⁰⁴⁸ In addition, there is also a provision for a separate jurisdiction for Islamic law matters. The principles are even used as the basis for formulating certain policies at the national level that is absent in the Western approach. Naturally, national agenda involves priorities that affect the way of life of the citizens. The priorities may not be at tandem with the universality of human rights. Thus, Vision 2020, Malaysia's ambitious vision is set. The goal of the vision is to become a developed country. In pursuant of the goal, the National Information Technology Agenda (NITA) was developed as a major strategy for national development. The National IT Council

¹⁰⁴⁷ See footnote 25 in Mullender, R. Human Rights: Universalism and Cultural Relativism. (2003) 6 *CRISPP* 70.

¹⁰⁴⁸ Article 3 of the Malaysian Constitution.

(NITC) launched NITA in December 1996. It provides the foundation and framework for the utilization of information and communication technology (ICT) to transform Malaysia into a developed nation in accordance with the Malaysian mould in realising the nation's aspiration. NITA's vision is to use ICT to transform Malaysia, across all sectors, into an information society, then a knowledge society, and finally a "value-based" knowledge society. The main emphasis here is on local content and culture compatibility.¹⁰⁴⁹

However, privileging local particularities, conditions and mould could be a façade for allowing authoritarian policies. It also could be used by the government to resist the universality of the human rights on the sentiment that past colonial countries promote it as a new form of imperialism. Nonetheless, there is a genuine concern of ignorance of the local factors that may not be at tandem with the universality as preached by the West.

Protection of human rights in accordance with the local mould appears justifiable. Yet, there is an uncertainty in relation to the mould. It conveys a paternalistic expression, which the government relies on to justify its action that amount to restriction of individual freedom. Perhaps the local mould is based on the accepted norms, cultures and values peculiar to the local society. These particularities are different with the Western practices not only in form but substance. In this regard, Faruqi argues that the differences between the orient and the occident make adaptation of universal concept of human rights such as freedom of expression to local situation as necessary.¹⁰⁵⁰

The generality of the mould is a good excuse for failure to accord the society its democratic entitlements. The connection between the West and the new form of imperialism is unconvincing. Freedom of expression and privacy are not the rights attribute to the states but it is the empowerment of individual person against infringement of personal autonomy. To reject these rights on the basis of differences between nations

¹⁰⁴⁹ <http://www.nitc.org.my/nita/index.shtml>

¹⁰⁵⁰ Key differences such as Western secularism, individualism, universalism, priority on civil and political rights over socio-economic rights and right-based political theory make the practice of human rights from Western perspective as unsuitable to Malaysian condition. See Faruqi, S.(1999) Human Rights and the Constitution. In S. Rachagan and R. Tikamdas (eds.) *Human Rights and the National Commission*. Kuala Lumpur, 130.

is to deny the inherent part of humanity. However, there may be differences as to the scope of the rights. The extent of the rights is determined by the state in accordance with the local elements.

The real disagreement then is in relation to the extent of the rights. Some countries are criticised as being too restrictive compared to others. In Malaysia, the parameter of local mould serves as insulation in the process of adopting foreign legal principles. It enables Malaysia to apply principles that are suitable to Malaysian plural society. Whilst recognition is given to the importance of freedom of expression, and to a certain extent privacy, restrictions are being imposed which make the scope of the freedom becomes narrow. This is where the government is criticised for failure to emulate the practice of other democratic countries in giving more space to freedom.

The criticism may be unfair because the local conditions and particularities of Malaysia are dissimilar to the other countries. It fails to consider the emphasis and priority of the government in the furtherance of the nation's well being. For instance, the introduction of restrictive laws such as the ISA was to prevent subversive activities that can inflict harm to the nation. On the same premise, the introduction of Anti-Terrorism, Crime and Security Act 2001 in the UK and the Patriot Act in the US which allows detention without trial is a commitment based on particularity of local situations. The extent and scope of freedom may vary due to different considerations on national interest, social stability, peace and harmony.

Socio-economic equality may be the main agenda of developing countries like Malaysia, compared to developed countries that emphasise civil and political rights. Striving for socio-economic betterment in pursuing the Vision 2020 may allow, to a certain extent, restrictions on individual rights. Different emphasis seems to create polarity where developing countries are seen as practicing less freedom. This misconception occurs due to patronising attitude where the practice of individual rights in developed countries is perceived as more liberal than developing or less developing countries. However, the application of several pre and post *Merdeka* (Independence) restrictive laws shows that Malaysia embraces the idea of the goodness of the laws instead of right to the people. It is

in this context that the writer believes that reformation informed by the principle of distributive justice is needed. Thus, Malaysia's commitment should be predicated on what is right for the people.

On the other hand, the application of local perspective could not be defended in the situation where it is used to maintain political power. The basic values of a democratic society in leading their lives and shaping the country are not dictated by physical boundary. The right to criticize the performance and wrongdoings of the government should not be curbed on the ground of local condition. Any restriction on such right will only diminish the characteristic of a prudent democratic society. On the other hand, the application of local perspective can be a ground for the government to justify the imposition of restrictions on individual rights. The use of local peculiarities in this way is an autocratic exercise of power. It is a form of coercion exercised on the people to maintain status quo especially in relation to political control. The application of security laws such as the Internal Security Act 1960 and the Sedition Act 1948 against political oppositions and NGO movements is the manifestation of an authoritarian practice. This is in contradiction with the democratic principles espoused by the government and Malaysian constitutional values under the fundamental liberties.

The practice of individual rights by the developed countries such as the UK may not always be compatible with the local considerations. Failure to allow the practice of wider individual rights and personal liberties on the basis of inaptness with local condition is based on political justification rather than legal. The writer argues that this may only widen the sentiment that creates a perception gap and dichotomy in the practice of individual rights between developed and developing countries. In Malaysia, the application of local perspective and mould in exercising personal liberties reflects the influence of the executive branch. Reliance on the local mould by the government is for the purpose of preserving domestic social harmony within a plural society. But, to some extent, it is used to insulate the western social practices, which are perceived as more open and liberal, particularly in relation to issues involving moral values such as homosexual. In this regard, the former minister, Datuk Seri Dr Rais Yatim in his reaction to the proposed human rights resolution in the UN to punish nations which banned

homosexual activities said that ‘There are countries, including Malaysia, that do not recognize sexual relations between males and such a law is sovereign and basic to us.’¹⁰⁵¹

Preservation of a harmonious environment and the resistance of inappropriate foreign practices are the issues being capitalised by the ruling party to ensure political dominance. For the past forty-seven years, the same political party, *Barisan Nasional* (National Front) has been governing Malaysia. Though the setup of the Malaysian constitution provides for separation of power among the executive, legislature and judiciary, the separation is vague in practice. There is no real separation between the executive and legislature because most of the members of the executive are from the legislature. The majority voice in Parliament enjoyed by the ruling party enables the executive to introduce laws without hassle. Under the Federal Constitution, Malaysian laws can only be legislated by Parliament. Article 66 (1) provides that in order for a bill to become law it must be passed by both houses, *Dewan Rakyat* (lower house) and *Dewan Negara* (Upper house) and assented to by the *Yang di-Pertuan Agong*. Therefore, according to the provision there must be three parties involve in the making of laws. It is difficult to defeat a government’s bill in *Dewan Rakyat* because the ruling party controls the majority power. They form a hegemonic force in supporting the government. Hegemony exists when there is a convergence of effort towards general direction imposed on social life by the dominant fundamental group. Such a force is readily exercised when the ruling party appoints the majority of the members of the *Dewan Negara*. As such, the government enjoys a convincing control of both legislative houses, which makes the process of endorsing the government’s action as a procedural convenience. It is unlikely for the representatives to go against the government’s will because they represent the government’s voice in the legislative assemblies. In this regard the *Dewan Negara* is merely functioning as a rubber stamp.

The only party that may affect the passing of a bill from becoming a law is the *Yang di-Pertuan Agong* (the King). Prior to 1988 *Agong* has the power to refuse to give his royal assent to a bill. In the event where *Agong* decides to exercise this power, a bill will cease

¹⁰⁵¹ Atan, H. Rais: UN ill-advised on homosexual laws. *New Straits Times*, 2nd February 2004.

from becoming law. However, Article 66 was amended with the inclusion of new sub Article (4A) that provides:

If a Bill is not assented to by the *Yang di-Pertuan Agong* within the time specified in Clause (4), it shall become law at the expiration of the time specified in that Clause in the like manner as if he had assented thereto.

The effect of the new provision is that the *Yang di-Pertuan Agong*'s power to give his royal assent in order for a bill to become a law is withdrawn. Therefore, a law can be passed effectively only by both houses which are controlled by the executive. The role of *Agong* is thus reduced to a symbolic role. The members of Parliament from the ruling party are expected to fully support the executive policies and pass any legislation throughout the parliamentary process. The executive upholds the idea that local particularities necessitate the exercise of individual rights to be in accordance with the local mould.¹⁰⁵² They seek to justify the idea by continuing the existence of several laws such as Internal Security Act 1960, Official Secret Act 1972, Printing Presses and Publication Act 1986 and University and University Colleges Act 1971, deemed to be repressive by human rights organisations. There seems to be a clash with the aspiration to create a developed society under the vision 2020 with the restrictive action of the government.

The constitutional qualifications make the freedom of expression the most restricted individual's right. The qualifications empower the executive to restrict the freedom. The approach of regulating rights in accordance with the executive interest may lead to an authoritarian government. The democratic process that takes place in Malaysian Parliament may portray that there exists a vibrant democracy. However, under close scrutiny there may be a false representation of the existence of such a vibrant democracy. For instance, the case of the two state legislative assembly members from the ruling party who were put under disciplinary action for being neutral during the passing of legislation introduced by the government discloses an element of autocracy. It shows that there is a strict unquestionable duty to always support and uphold the government's policies. A

¹⁰⁵² Hate Journalism should not be allowed to take root- Khalil. *BERNAMA*, 17 December 2003. http://www.bernama.com/bernama/state_news/new.php?id=35633 (Accessed 18 December 2003)

similar situation is applicable to government's civil servants where they are under the obligation not to engage in any kind of activities that may be interpreted as against the government.

The exercise of individual rights subject to local conditions does not appeal to the domestic human rights movements. In 1994, fifty NGOs have endorsed the Malaysian Charter of Human Rights that expressed the universality of human rights. It also points out that those cultural practices that derogate from universally accepted human rights must not be tolerated. However, the position of these NGOs is difficult to be translated into practice in Malaysia. The obscurity of universal value of human rights raises a question of the standard used to assess local cultural practices that are not acceptable. On the other hand, the approach of local mould, which implies cultural relativism, may create a rule by law, which coerces the people to follow the state of affair as paternalistically determined by the government. This approach involves minimal democratic participation. It may also isolate Malaysia from the widely accepted principle of human rights practiced by other democratic countries under the auspices of UNCHR. The repercussion is not only on the socio-political environment in Malaysia but also economic activities. It may be less attractive for foreign business to invest and set up businesses under the Malaysian Super Corridor project if the human rights practices such as freedom of expression and privacy are not protected. Perhaps this is part of the reason for the government to make a pledge to allow leverage on freedom of expression on the internet and proposes a new law on personal data protection.

Human rights in Malaysia exist within the constitutional framework. However, interests of communalism impulse qualify the exercise of the rights. The rights are exercised in accordance with the peculiarities of socio-political environment. Cultural plurality in multiracial society requires the exercise of individual rights to be in accordance with the local condition. The application of local condition does not amount to denying the universality of the rights in principle. The difference is mainly on the substance and to certain extent the practicality of the rights. There are other paramount considerations such as social stability, peace and harmony that could override individual rights.

Public discussion on several issues that are deemed to be sensitive in the context of Malaysian society, such as the *Malays* privilege, may cause disruption and is harmful to social and public order. This is vindicated by past experiences of racial riot and political crisis, which leave a grave impact on the nation well being. The current political environment, which is still dominated by ethnicity, may be a factor for the need to regulate liberal discussions. The maintenance of peace and harmony through racial integration will be affected if open discussion on racially aggravated issues is permitted. Furthermore, the exercise of individual rights as perceived by developed countries such as the UK may not be appropriate in Malaysian context where dual legal system is practiced. For instance, the UK recognises the matrimonial relationship between couple of the same sex. On the contrary, this kind of relationship is prohibited in Malaysia.

Besides the common law system, Malaysia also gives limited scope to Islamic law. To apply the universality of human rights, which are informed by secular perception into a society that incorporates part of religious law in the legal system, is incompatible. Compatibility is an issue when it comes to the exercise of freedom of expression as practiced by other developed countries such as the UK on issues, for instance, regarding the right of gays, lesbians and same sex marriage. It is a misconception to exercise the freedom relying on universalism on this point because it could be seen as importing foreign elements. In this regard, it is unfair to criticise a country as undemocratic on the basis of its failure to allow freedom of expression as practice by other countries without giving due consideration to the local conditions. On the same premise, the exercise of rights based on individualism should also give way to communitarianism. Thus, free expression as an individual right could be curtailed to avoid harmful effect on the community. Nevertheless, it could be difficult to achieve the objective of being a developed country when the exercise of fundamental freedom such as freedom of expression is restricted for the purpose of political advantage. Strict adherence to either universalism or relativism is incoherent in a pluralistic environment. Arguably, the adoption of universalism could interrupt the harmonious environment and tolerance in Malaysian plural society. This is due to the difficulty in reaching a meeting of minds as to the universally acceptable principles in such a society. Thus, an accommodative approach

that take into account both, universalism and relativism, is practical in a plural society such as Malaysia. This is the approach to which we now turn the focus.

7.3 REFLECTIVE EQUALIBRIUM

The current socio-political fabric of Malaysian society requires a pragmatic approach in exercising fundamental rights. This may be possible by way of adopting the reflective equilibrium approach.¹⁰⁵³ This approach encourages synergic application of particularism and universal principles in achieving a desired end-state. Reflective equilibrium is a deliberative process of ‘going back and forth’,¹⁰⁵⁴ where ‘our considered judgments about substantial justice in particular case coincide with our most deeply held convictions about moral principles.’¹⁰⁵⁵ Reflective equilibrium does not merely emphasise on local conditions so as to make it prominence. It allows the integration of universal principle whilst maintaining the importance of local elements. Thus, the approach rejects privileging any particular considered judgment or guiding principles in the process of practical deliberation.

The approach is also flexible in the sense that the exercise of over-arching principles such as free expression are upheld as long as they are resonant to the reality of local environment. In this sense, the adaptation of universalism is mainly by way of adjustment to a desired end-state where equal weight is given to guiding principles and considered judgments.¹⁰⁵⁶ In defending the coherency of reflective equilibrium, Mullender argues that the approach highlights the interconnection of the general aim of human rights law and the practical means by which that aim is pursued. The approach also ‘forestall both grandstanding (windy appeals to the general aim of human rights law) and complacency (the lazy assumption that in such-and-such a jurisdiction ‘we know how to protect human rights’).’¹⁰⁵⁷ On this account, it could arguably be said that reflective equilibrium is an accommodative approach amenable to cosmopolitan

¹⁰⁵³ The approach is given prominence by John Rawls. See Rawls, J. (1971) *Theory of Justice*. Cambridge, 48-9.

¹⁰⁵⁴ Ibid, 20.

¹⁰⁵⁵ Schwartz, J. Relativism, reflective equilibrium, and justice. (1997) *Leg. Stud.* 128, 131.

¹⁰⁵⁶ Ibid, 48.

¹⁰⁵⁷ Mullender, R. Human Rights: Universalism and Cultural Relativism. (2003) 6(3) *CRISPP* 70, 86.

arrangements¹⁰⁵⁸ whilst judgmental towards a dogmatic paternalism in achieving the general aim of human rights law.

With regard to Malaysia, the exercise of reflective equilibrium as a coherent approach is reflected in section 3 of the Civil Law Act 1956. Although the provision is confined to the issue of the applicability of English legal principles, it sets a framework for the approach, which makes Malaysian legalism receptive towards the application of foreign principles. However, the framework gives prominence to particularism whereby foreign principles need to pass the test of local condition as a contingent requirement in order for the principles to be applicable. In this context, the ubiquitous of local condition informed by relativism renders reflective equilibrium as a constraint on conception of justice.¹⁰⁵⁹ Although this could be the case in a divided society where there is a favoured conception of justice, Malaysia could do better by subscribing to the process that take into account various considerations from relativism as well as universalism point of view.

There is a platform for the exercise of reflective equilibrium under section 4 (4) of the Human Rights Commission Act 1999.¹⁰⁶⁰ The provision allows the Malaysian Human Rights Commission (SUHAKAM) to have regard to the Universal Declaration of Human Rights 1948. Though it is uncertain as to whether the provision incorporates the UDHR in clear term, the provision, nevertheless, paves the way for universalism under the UDHR in the effort of protecting and promoting human rights at national level. The impact of this is a degree of flexibility in expanding the perception on the underpinning principle of free expression and privacy that are confined by the Constitution.

7.4 ARGUMENTS FOR PRESS LIBERALISATION IN MALAYSIA

Freedom of the press is one of the fundamental characters of a democratic society. The press plays a pivotal role in creating awareness among the public by being a watchdog on matters of public interest. But sometimes the noble role reverse to by being a hound-dog unjustifiably invading the privacy of others by disclosing private information.

¹⁰⁵⁸ Op cit., supra.

¹⁰⁵⁹ Schwartz, J. Relativism, Reflective Equilibrium, and Justice. (1997) *Leg. Stud.* 128, 168.

¹⁰⁶⁰ Malaysian Act 597.

Nonetheless, it is undeniable that in order for the press to function effectively in gathering, informing and publishing information they should be free from governmental or political influence.

There is a question on the extent of freedom the press should enjoy. Although the press is widely recognised as an important organisation, they however do not enjoy an absolute freedom. In this context, Malaysian constitutional commitment to freedom of speech and expression is predicated on the belief that the interest of the society as a whole necessitates the imposition of restriction on the freedom.

The Federal Constitution recognises the right of the citizens to freedom of speech and expression. However, there are qualifications that render freedom of expression in Malaysia as not an intrinsic right on its own.¹⁰⁶¹ The existence of several laws such as Official Secret Act 1972, Internal Security Act 1960, Sedition Act 1948 and Printing Presses and Publication Act 1984 has the effect of inhibiting freedom of expression including press freedom in Malaysia. With the application of these laws, Malaysia is ranked at 122nd in the world in term of press freedom. This observation is conducted by Reporter *Sans Frontieres*, an independent international watchdog on press freedom, published in their report on press freedom index.¹⁰⁶² Though the ranking is done in accordance with universal standard of press practice which may not be the practice at domestic level, nevertheless, the report exposes restrictions on press freedom that is not befitting to a government professes to subscribe to democratic principles. The residual character of freedom of the press in Malaysia permits the press to indulge in matters that are within the constitutional limitation only. As far as the government is concerned, there is a legitimate need to curtail the press freedom in the interest of the multiracial society. The diversity of culture and religious belief of Malaysian society requires prudence in maintaining stability and harmony. Certain issues are therefore prohibited from public discussion due to its sensitivity, which is harmful to the harmonious and tolerance environment in Malaysia's plural society. Past experiences in relation to social and public disorder are taken as lessons by the government. In this regard, unregulated

¹⁰⁶¹ Press freedom which is part and parcel of freedom of expression subjects to the same qualifications.

¹⁰⁶² Third Annual Worldwide Press Index. http://www.rsf.org/article.php3?id_article=11715

freedom of expression managed to destabilise and threaten the harmonious social and public order.¹⁰⁶³ Therefore, preventive measures are thought to be effective and appropriate under the local condition.

On the other hand, this authoritarian approach is contrary to the constitutional democracy where rule of law is one of the main attributes of the Constitution. The pre-emptive approach in protecting the communal goals may disintegrate the democratic values where rule by law becomes predominant. The use of law to curb press freedom on the ground of security and order could be queried particularly when it relates to issues where the interest of the ruling party is involved. In this context, reliance on security and order to justify autocratic actions in fact is a process of legitimisation of the ulterior purpose, which is to maintain political power. Thus, the fundamental liberties as enshrined in the Constitution should be upheld as rights that must be protected. Exceptions to the rights must be strictly interpreted.

Freedom of the press is part of the manifestation of a functional democracy. The essential role of the press in a democratic society in imparting ideas and communicating information is recognised as providing the means by which freedom of expression may be exercised. Participative democracy allows only a small minority of citizens to participate directly in the discussions and decisions that shape the public lives of that society. The majority can participate indirectly through their votes, opinions, representations and public consultations. But these kinds of participation are pointless if the majority is not alerted and informed about matters that call or may call for considerations and actions.¹⁰⁶⁴ Therefore, the proper functioning of a modern participatory democracy requires that the press be free and active. Freedom of the press to publish any news or information acclaimed its legitimacy from the freedom of expression under Article 10 of the Federal Constitution. Under the Constitution, freedom of expression is a form of negative right. In other words, there are legitimate exceptions

¹⁰⁶³ News on incident of *Kampung Medan* in the state of Selangor, allegedly sparked by racial sentiment, which caused deaths was suppressed by local newspapers. The government promised a report on the incident but the report is not forthcoming up to date.

http://www.suhakam.org.my/docs/document_resource/Annual%20Report%202001.pdf

¹⁰⁶⁴ See per Lord Bingham in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 291.

to the exercise of the right. Consequently, it makes the press in Malaysia enjoy a limited freedom.

Strict regulation on press freedom is perpetuated by legislations as well as common law principles. As far as regulation is concerned, Malaysia exercises pre-restraint. It is mandatory for the press to acquire a license in order to operate. The PPA under section 7 provides the licensing requirement. Once the minister in charge gives an approval, the press can publish and print on matters that are in accordance with the constitutional guarantee. Therefore, for the press to invoke the constitutional right of freedom of expression, it must be able to operate legally in the first place. The imposition of pre-restraint through licensing requirement imposed by the government is inconsistent with the constitutional guarantee of freedom of expression. Nevertheless, the exceptions in Article 10 (2) (a) are wide enough to allow the practice of pre-restraint.

In addition, there is a two-tier press-monitoring scheme under the PPA. The first tier is the vast discretionary power accorded to the Minister under the Act. Second is the absolute power of the Minister to revoke the license at any time. Thus, the study proposes that the licensing requirement be relaxed and flexible by making it as a procedural requirement rather than a substantive matter. Licensing requirement may serve as a useful tool for administrative purposes but it should not be used as a controlling apparatus to restrict press freedom. Therefore, a license should be issued once an application is in accordance with procedural requirement. It should not be subjected to approval under the wide discretionary power of the executive, in this regard the Minister. This is in line with the spirit of constitutional guarantee of freedom of expression.

Furthermore, the control of the mainstream press by the ruling political parties does not help to flourish the exercise of freedom of expression. The interest of political parties in maintaining political power to a certain extent silences the press from indulging in matters that is prejudicial to the interest. It creates an attitude of compliance to the influence of the controlling party. This contributes to the practices of self-censorship and avoidance by the press. In certain circumstances, the press is also used as a tool to propagate the political agenda of political parties especially during election. There is a

difference between the press taking sides by supporting a particular political party and the press being controlled by political parties to strengthen their political agenda. The support given to any political party does not mean that the press is being manipulated to orchestrate one-sided political ideology. Political support is an approval of the policies of a political party believed to be beneficial for the public interest and the nation as a whole. Under the former, the press can still be free to get involve in any issue without interference and dictation.

Therefore, the mainstream press should ideally be free from being controlled by political parties. This can be done through the government's commitment by introducing statutory prohibition or limiting the equity that can be held by political parties. However, based on the current political climate, this is unlikely to happen because of the powerful executive branch in Malaysia.¹⁰⁶⁵ In addition, judging from the recent 2004 election where the ruling party obtained an impressive victory to maintain political power, the vast majority of people seem to be comfortable with the current policies of the government. Alternatively, there should be no restriction in relation to the establishment of the press except under normal business and company law.

In relation to this, Safar argues that the local press cannot be assessed through the Western concept of press. The role of the press in Malaysia is in actual fact wider than merely imparting information. Historically, the Malay press helped in the struggle for independence and led the course to forge racial unity. According to him, the particularity of local conditions allows for indigenisation of the press in Malaysia to take place. This is vindicated by the contribution of the press in preserving peace and harmony in resonant with the aspiration of the nation. However, the indigenisation of the press on his account may only strengthen the point that reliance on local mould is not for the purpose of liberalizing freedom of the press but mainly for political reason. Subsequently, the mainstream press controlled by political party is attuned to the government's ideas and policies. As such it is difficult for the press to break away from the dominance of the government especially the executive.

¹⁰⁶⁵ Yatim, R. (1994) *The Rule of Law and Executive Power in Malaysia: A Study of Executive Supremacy*. University of London.

The writer argues that there should be no differences of role of the press in democratic countries, be it in the UK or Malaysia. The demarcation according to geographical and demographical area should not be the reason for indigenisation of the press. Instead, it is the scope of freedom that determines the extent of press freedom in different countries. Certain subject matters, which are considered as acceptable under freedom of expression according to western liberal perspective, may not be so in Malaysia. But that does not make Malaysia as less democratic because the yardstick, Western liberal democracy, is misconceived.

The importance of the press in a democratic society does not thwart the necessity to regulate the press. Although regulation on the press in Malaysia exists under legislations but it does not relate to regulating the conduct and standard of the press. The following discussion will examine the need to form a specific institution for this purpose in Malaysia.

7.5 MEDIA COUNCIL: IS IT RELEVANT?

The commoditisation of information requires the press to employ means capable of attracting readers. Like any other business, the press has to win over readers to increase their circulation to make profit. Most of the press particularly the tabloids rely on sensationalism in their coverage. But some press sensationalised coverage to make it attractive to entice the interest of the readers. The latter type of press practices tabloid journalism, which focuses on revealing private lives of public figures, celebrities capitalising on the lurid curiosity of certain group of readers. The practice of this type of journalism does not contribute in a progressive way towards developing informed society.

Newsworthiness is determined by the press, which finds its justification on the interest of the public. The uncertainty in assessing what amounts to newsworthiness sometimes put the press in a legal predicament. From the press point of view this is regarded as a restriction on freedom of expression. Sometimes the press conjures up the protection of freedom of expression in order to protect their commercial interest. Though the objective

of the press may vary, they form a hegemonic force when it comes to protecting freedom of expression and the press.¹⁰⁶⁶

In Malaysia, there is no organisation or body with an authority to deal with matters pertaining to press. The existing organisation such as National Union of Journalists, which is formed under the Trade Union Act, is confined to the social aspect and welfare of journalists rather than to the press as a whole. The Malaysian Press Institute is a non-governmental organisation that aspires to sustain the ideals of free and responsible press. But it has no legal authority to govern the press. Consequently, the institute that is regarded as conservative in dealing with press freedom does not seem to get full support from the press and journalists.

7.5.1 SUHAKAM AND RIGHT OF PRIVACY

On the other hand, the Human Rights Commission (SUHAKAM) plays a limited role in relation to the press on the platform of freedom of expression as a human right issue. Even though SUHAKAM is empowered to inquire into complaints and makes report on matters concerning free expression,¹⁰⁶⁷ it is powerless as far as adjudication and remedial action is concerned. SUHAKAM is not equipped with adjudicatory power to deal with complaints involving breach of human rights. Nevertheless, it has the power to inquire into matters pertaining to human rights issues such as freedom of expression and right of privacy but not the press as a whole. Although SUHAKAM is not a regulatory body such as the Press Complaint Commission in the UK, the authority vested in it could make SUHAKAM as the appropriate body to protect right of privacy in Malaysia.

SUHAKAM could be accorded the quasi-judicial power to deal with matters pertaining to breach of human rights. However, it is still uncertain as to whether invasion of privacy can be addressed effectively by SUHAKAM even if its role is expanded to such an extent. The main reason is due to the lack of recognition of privacy as part of fundamental liberties under the Constitution. As such, right of privacy will still be elusive under the proposed expansion of power. This is because the scope of human rights in

¹⁰⁶⁶ Such a force has resulted in the introduction of section 12 of the Human Rights Act 1998 in the UK.

¹⁰⁶⁷ Section 4 (1) (d) of the Human Rights Commission of Malaysia Act 1999.

Malaysia, which is the thrust of SUHAKAM's existence, is based on the constitutional provisions. It would be difficult to amend the Human Rights Commission Act for this particular purpose assessing from the government's reaction to the reports and suggestions forwarded by SUHAKAM. In 2004, SUHAKAM established the Media Complaints Working Committee (Committee).¹⁰⁶⁸ The purpose of this Committee is 'to receive and deal with complaints pertaining to human rights violations in relation to the print media and journalists and editors.'¹⁰⁶⁹ The jurisdiction of the Committee emanated from section 12 (1) of the Human Rights Commission Act 1999.

The terms of reference of the Committee state that the provisions will guide it on fundamental liberties in the constitution. It also allows the Committee to refer to the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights particularly Article 19 regarding freedom of expression.¹⁰⁷⁰ It could arguably be said that the application of Article 19 of the UDHR is inconsistent with Article 10 of the Malaysian Constitution. The scope of freedom of expression under UDHR is wider than the Malaysian Constitution. The exercise of freedom of expression under Article 10 is limited by Article 10 (2) (a) and (4) of the Constitution. Even if it is recognized that the UDHR is incorporated into domestic law on the basis of section 4 (4) of the Human Rights Commission Act 1999, the exercise of free expression as interpreted under the UDHR must be consistent with the provision of the Malaysian Constitution. Therefore, section 4 (4) of the 1999 Act must be read together with Article 4 of the Malaysian Constitution.

Interestingly, the Committee is empowered to inquire into complaints in relation with the conduct of reporting¹⁰⁷¹ and complaints on 'infringement of the privacy of individuals and their family life, home, health and correspondence.'¹⁰⁷² At this juncture, there is a question of justiciability on privacy issue. It is unclear as to on what legal basis will the

¹⁰⁶⁸ http://www.suhakam.org.my/docs/press_room/ps_MediaCouncil_250804.pdf

¹⁰⁶⁹ Terms of reference of the Media Complaints Working Committee.

¹⁰⁷⁰ Ibid, no. 5 and 6.

¹⁰⁷¹ This is referred as norms of journalistic conduct such as accuracy, opportunity to reply, gender bias, communalism, biased reporting and objectivity. See terms of reference no. 7 of the Media Complaints Working Committee.

¹⁰⁷² Ibid.

committee act upon in case of invasion of privacy by the press when there is no legal recognition of the existence of right of privacy in domestic law. Moreover, the absence of a uniform code of conduct to regulate press behavior in Malaysia would also raise a question on the ability of the Committee in dealing with the press invasive act.

Unless the courts extend the meaning of life under Article 5 of the Constitution to include personal privacy of individuals or recognise the existence of right of privacy by way of free-standing or existing cause of action, the Committee will have to rely on the existing laws especially the common law principles such as defamation, nuisance and breach of confidence. On the other hand, this conundrum could be overcome if the effect of section 4 (4) of the 1999 Act is to incorporate the principles under the UDHR. Article 12 of the UDHR, which provides for protection of privacy, may be used as a guiding principle in articulating issue on privacy in relation to the press at the national level.

On the other hand, the ability of the Committee to function is unquestionable as it is formed under the authority of the 1999 Act. However, its effectiveness in dealing with the invasive act of the press is rather doubtful. The role of the Committee is to act as a mediator.¹⁰⁷³ The outcome of the mediation has no legal consequences on the parties involved. It is not within the jurisdiction of this working committee and SUHAKAM as a whole to function as a regulator or compel any alleged wrongful party to comply with its recommendations. Moreover, the formation of the Committee is regarded as a unilateral act of SUHAKAM by the press. The resentment by the press as shown toward the proposed Media Council will have an effect on the credibility of the Committee. At the moment, it seems that the role of the Committee is limited to receiving complaints in its supervisory capacity.

7.5.2 MEDIA COUNCIL AND FREEDOM OF EXPRESSION

The inadequacy of the Human Rights Commission renders an alternative institution such as Media Council, important in dealing specifically with matters pertaining to the press. The primary role of the Media Council in Malaysia should be promoted as a conciliatory

¹⁰⁷³ SUHAKAM. Media Complaints Working Committee to Protect the Rights of Individuals and the Public's Right to Know. http://www.suhakam.org.my/docs/press_room/ps_MediaCouncil_250804.pdf

institution. The role in relation to regulating and governing the press should be regarded as ancillary. However, the existence of several restrictive laws in regulating the press in Malaysia may subjugate the role of the Council as a regulatory body. The inability of the Human Rights Commission to accommodate privacy could be rectified through the Council. Even though right of privacy is inexistence in Malaysia, the government recognises the importance of the right. This is so with the proposed Data Protection Bill that contains provisions relating to right of privacy. The effect of this legislation on protection of privacy in Malaysia is yet to be seen because the legislation is awaiting the parliamentary approval.

In addition, Media Council could also play an important role in protecting right of privacy against invasion by the press. The Council is a specific body with expertise and specialised knowledge in relation to the press. The Council could overcome the absence of specific laws on right of privacy with the introduction of a code of ethics. The existence of specific and clear codes may serve as guidelines in the absence of law on privacy. The advantage of having a code is that it is flexible and it does not involve complex procedural process. It is drawn up on a consensual basis for the purpose of governing the conduct of the press. Adherence to the code under the auspice of the Council should be made obligatory. This is to ensure a full commitment from the press in order for the code to be meaningful and effective. Though the code may not be of a legal binding document and has no legal force,¹⁰⁷⁴ its application is significant in protecting privacy. It is relevant especially when there is no specific law to protect right of privacy.

With regard to this, there is a code of ethics for journalists drawn up by the Malaysian National Union of Journalists. However, its application is confined to journalists under the patronage of the union. Thus, the code is relatively ineffective because of its limited application and lack of binding effect. The code has a binding effect only on the union's members in the press industry as recognised by the PPA. Therefore, the code does not govern the press as a whole. The efficacy of the code is also doubtful due to the fact that journalists within the fraternity draw it up. The existence of the code seems to tailor more

¹⁰⁷⁴ However adherence can be made compulsory by way of subscription.

to the affair of journalists rather than the need of the public. As such, the code is regarded as protecting the interest of journalists rather than the interest of the public. Hence, it exists more as a statement of ethics of journalism rather than a commitment to abide by the principles that govern the press as a whole.

Arguably, the NUJ as a union is incapable to deal with matters pertaining to public complaints in relation to privacy. The union is not an authoritative organisation representing the press. It is a trade union, which the main function is to protect the interest of its members. The union can only take action against its member for violating internal rules and regulations. Any action taken against its member is more likely as part of a disciplinary action. The result of the action will only affect the member *per se*. It is doubtful if the result will have any impact on the press in particular and the society in general.

Likewise, the attitude of the press in discharging their role sometimes creates strain relationship with the government and the people. In discharging their role as a watchdog in a democratic society, the press sometimes crosses the legal limit that makes them susceptible to legal action. Even though there is a degree of appreciation where the press could exercise their discretion in determining the way news or reports are being presented, that does not amount to legitimising the press to indulge in defamatory statements, disclosure of private information, invasion of privacy or matters prejudicial to security and public disorder. Summarily, the conduct of the press that does not merit high standard of journalistic professionalism contributes towards the necessity of setting up a body that specifically deals with the press.

The idea of Media or Press Council (Council) in Malaysia has been mooted since 1970s. Although there was an effort to establish the council but it has never been materialised.¹⁰⁷⁵ In actual fact, the purpose of having the Council as a regulatory body is to monitor and defend press freedom. The Council as an authoritative body governing the press may play a role in streamlining the conduct of the press particularly in being

¹⁰⁷⁵ In 1987, the president of NUJ said that a special memorandum to propose the setting up of a press council would be submitted to the government. But there was no response from the government. See Ali, A.R., NUJ dan Kebebasan Akhbar (1987) 8 *SASARAN* 16, 17.

responsible and accountable to in exercising their freedom. Subsequently, the credibility of the press in the society can be upheld.

With a clear authority and mandate it would enable the council to command respect and commitment from the press in order to maintain high ethical and professional standard. On the other hand, the Council should not be seen as a guardian of the press, otherwise it will undermine the regulatory function of the Council. The ability of the Council to discharge its role adjudicating a clash of interest in a fair manner may be under scrutiny. This is due to the press involvement in the Council. It is difficult to see how an organisation whose main function is to uphold and protect free expression can effectively provide protection to right of privacy. Furthermore, it may also affect the public's confidence especially when the interest of the public is in clash with the press. The Council also needs to create good relation with the public to maintain its credibility and fairness. As such, the Council should be free from the image of protecting the interest of the press by reducing the involvement of the press at adjudicatory level. Since the Council is a specific body dealing with the press, a member of the public can forward any grievances and complaints against the press.

With regard to this, a working committee was set up by the Malaysian Press Institute (MPI) in pursuance of the government's request to look into the feasibility of establishing a council for the media.¹⁰⁷⁶ In November 2001, a report was submitted to the Home Affairs Ministry for further action. Since then the government has not responded to the report and thus, further revelation on the proposed council has not been forthcoming.¹⁰⁷⁷ Hence, it is the stand of the MPI that journalists and not the government should establish the council.¹⁰⁷⁸

On the other hand, the idea of setting up a council for the media in Malaysia on the MPI view is opposed by several pressure groups such as *Aliran*, Charter 2000 and *Kumpulan*

¹⁰⁷⁶ The Media Council initiative began in 2000 with several meetings organized by the Home Affairs Ministry, followed by a task force set up by the MPI. See Theophilus, C. Media council will only happen with journalists' go-ahead. *Malaysiakini*, 26 April 2002.

¹⁰⁷⁷ According to the director of the MPI, the government can only make revelation on the details of the report. See *Malaysiakini*, Press council report cannot be made public for now: MPI.

<http://www.malaysiakini.com/news/2002040200015112.php>

¹⁰⁷⁸ *ibid.*

Aktivis Media Independen (KAMI).¹⁰⁷⁹ These groups are sceptical of the role of the Council in defending press freedom whilst the repressive laws are still applicable. The application of the law against the press impedes journalists from embarking on investigative and critical journalism for fear of persecution. The effect of the government having an upper hand creates the practice of stringent self-censorship. This is prevalent especially in the mainstream press, which is controlled by the ruling party, the same scenario where the influence and intervention of the government may occur in case of Media Council. Moreover, the Council is perceived as another governmental agency, a controlled body, to further regulates the press.¹⁰⁸⁰ On this premise, the existence of the Council could not contribute for the betterment of press freedom as well as freedom of expression in general.

The scepticism over the establishment of Media Council is justifiable considering the existence of several repressive and inhibitive legislations such as ISA, OSA, Sedition Act and PPA. However, there is another aspect of the role of the Council that makes its existence relevant, particularly with regard to complaints against the press behavior. The idea of having Media Council is not to suppress press freedom by creating another layer of regulation. Instead, it is to uphold the freedom by ensuring the practice of high standard of professionalism. Such a standard requires the press to be accountable to and responsible for their conduct in exercising the freedom. Currently in Malaysia, there is no specific body like the Press Complaint Commission (PCC) in the UK, a body that can receive and act upon complaints from individuals affected by the press invasive conduct. With this effect however, it is pertinent to establish whether the self-regulation modeling on the PCC is appropriate for Malaysia. Before any recommendations could be made, it is only appropriate to scrutinise the system at hand.

7.6 SELF-REGULATION IN THE UK

The application of self-regulation by a private sector is to regulate and detach itself from the government's control. It is to ensure high ethical standards within the circle in

¹⁰⁷⁹ <http://www.aliran.com/>

¹⁰⁸⁰ Netto, A. Op-press-ive council in the making. Aliran.
<http://www.malaysia.net/aliran/monthly/2001/5i.html>

accordance with the accepted practice. This system emphasises that the industry or profession rather than the government determines the mechanism of regulation.

The question of establishing self-regulation or statutory body depends on several factors where local conditions are pertinent.¹⁰⁸¹ Arguably, self-regulation could function effectively in a vibrant democracy where freedom of expression and the press is safeguarded. On the contrary, the system is not compatible in situations where regulations on free expression and the press are dictated by statutory legislations. In case of Malaysia, the writer is unconvinced that self-regulation is the answer to govern press activities. The existence of the restrictive legislation particularly the PPA that only recognizes licensed press would defeat the purpose of self-regulation. This is due to the fact that matters pertaining to the press are under the discretionary power of the Minister. In retrospective, one of the purposes of establishing media council is to protect freedom of expression. The nature of self-regulation whereby the framework as well as the substance is determined by the private sector rather than the government provides a solid foundation for the freedom to proliferate. However, restrictions on freedom of expression imposed by the government may only fossilize the purpose.

Evidently, any form of control imposes on the press may limit their potential in creating an informed society by disclosing issues of public interest. In fact, it contradicts the essence of self-regulation, which seeks to detach its existence from the government's influence and control. Therefore, prior-restraint on press freedom such as licensing requirement may only defeat the purpose of self-regulation, as the press is still required to observe the conditions that come with the license. Failure to abide by the conditions may cause a revocation of license. Obviously, this is a form of coercion that influences the press to practice self-censorship under the pressure of losing the license.

On the other hand, full commitment from the press fraternity is vital in order for a self-regulatory body to function effectively. Arguably, it is futile to have self-regulation if there is lack of support and willingness to comply with the system by the press

¹⁰⁸¹ Pinker, R. Press Freedom and Press Regulation – Current Trends in Their European Context. (2002) 4 *Comm. L.* 102, 105.

themselves. Most importantly, lack of cooperation among the press to embrace self-regulation will polarise the industry. For instance, part of the inefficiency of the Press Council in 1964 was due to its inability to command the respect of the industry itself. Not only did it affect the public's confidence on the efficacy of the system, but it also forms a basis for introducing a statutory regulation.

One of the benefits of having self-regulation is its practicality in resolving complaints against the press. It is effective for the aggrieved individual to seek redress against newspapers because of its accessibility, flexibility and quickness. There is no strict procedural requirement for a complaint to be heard. It is also inexpensive to bring an action under the system, as the cost is minimal compared to those under the court system. The expertise possessed by the regulators means resolution of complaints in relation to the press can be dealt with professionally and convincingly. This may garner public confidence in the system. In relation to the PCC, Silber J. in *Anna Ford v PCC*¹⁰⁸² said that:

The Commission is a body whose membership and expertise makes it much better equipped than the courts to resolve the difficult exercise of balancing the conflicting rights...¹⁰⁸³

Since the press mainly supports PCC, naturally the main purpose would be to protect the interest of the industry. PCC cannot be too vocal and harsh on the press because this will wane the much-needed support in order for the system to be fully operational. In this regard, Sir Christopher Meyer reminded the press that 'Indeed, without this willingness, and the support of all members of the industry for the work of the PCC in upholding the Code, it will not in the end be possible to avoid other, infinitely less desirable and less workable, forms of regulation.'¹⁰⁸⁴

In the UK, self-regulation is adopted as the mechanism to govern and regulate the conduct of the press. The Press Complaints Commission (PCC) was set up in 1991 as a revised body from its predecessor, the Press Council. The Council was a regulatory body

¹⁰⁸² [2001] EWHC Admin 683.

¹⁰⁸³ Ibid, para. 28.

¹⁰⁸⁴ Speech given at the Society of Editors' Annual Lecture, 12 October 2003.

whose primary objectives were advancement of the freedom of the press and the promotion of adherence to high ethical standards. It is a non-statutory body formed by the press. The inability of the Council to regulate the industry and deal with privacy matters satisfactorily lead to criticism and its demise.

The PCC was established on recommendation of the Calcutt Committee.¹⁰⁸⁵ Nonetheless, in his review of press self-regulation in 1993,¹⁰⁸⁶ Calcutt concluded that the self-regulation under PCC had not proven effective and that a statutory body should be established. The press's influence and control, to certain extent, affect the PCC in functioning as an independent body. The failure of the PCC to act effectively in regulating the press in relation to privacy matters intensifies a call for introduction of a new tort of infringement of privacy.

Obviously, financial support and stability is very important in a self-regulation system. In the UK, the Press Council Board of Finance (Pressbof) was set up in 1990 to maintain the characteristic of independent self-regulatory body. Pressbof is the body that currently levies from the industry to fund the PCC. This financial support is to ensure the independence of the Commission from the government. This image is significant for self-regulation not only to woe public confidence but also self-confidence in discharging its function without any form of influence from the government. Financial contribution from the government in this respect may raise an issue of influence and control that is inconsistent with self-regulation mechanism. Thus, with financial independence, the integrity of PCC as an independent body could be maintained.

Although PCC manages to raise the standard of journalism through its code of practice,¹⁰⁸⁷ self-regulation does not always work. Even with the implementation of the code, PCC is still unable to stop breaches. Thus, the power of the PCC to prevent publication of offending materials or further publication is deemed necessary. The Daily Mirror scandal in publishing fake photographs of alleged abused prisoners in Iraq that has

¹⁰⁸⁵ Report of the Committee on Privacy and Related Matters (1990) Cm 1102.

¹⁰⁸⁶ Review of Press Self-Regulation. Cm 2135 (1993).

¹⁰⁸⁷ Coad, J. The Press Complaints Commission – Some Myths About Self-Regulation. 2003.
<http://www.simkins.co.uk/articles/JKCPressComplaintsCommission.aspx>

adverse effects on the integrity and morale of the British force vindicates for such a power. The number of adjudications against the press shows that even those who are bound by the code commit quite a number of breaches.

The fact that the code is composed and reviewed by a special committee of editors may raise concern that it is to protect the interest of the industry. Independence of self-regulatory body does not only mean free from the government's control but the industry as well. There is a need for independent individuals outside the industry to review the code so that the PCC is not seen as the guardian of the press industry.¹⁰⁸⁸ Thus, the code, 'written by editors and for editors',¹⁰⁸⁹ which is supposed to protect unduly interference of private lives should not be the exclusive domain of the press.

In addition, there is an issue of the degree of independence of any self-regulatory body. Naturally, there is a degree of connection with the industry that it regulates.¹⁰⁹⁰ For instance, the PCC is depending on the support from the press industry for its funding. Although the representatives of the press in the PCC is minority but they command a powerful influential voice. Moreover, the lay members have no say except to obediently apply the code designed by the committee of editors. Therefore, the press industry is able to a certain extent influence the course of the PCC.

There seem to be unequal treatment by the PCC in relation to freedom of expression and privacy. PCC is more protective of the former rather than the latter.¹⁰⁹¹ Perhaps the PCC which was formed 'with almost indecent haste'¹⁰⁹² to avoid government intervention by way of statutory regulation is a proxy of the press industry rather than a truly independent body. Moreover, the code does not provide in its strongest term for preventing intrusion of privacy. The unequal treatment may be discerned from the requirement of justification

¹⁰⁸⁸ Kennedy, H. (2004) *Just Law*. Chatto & Windus, 256.

¹⁰⁸⁹ Key Benefits of the System of Self Regulation.

<http://www.pcc.org.uk/about/benefits.htm>

¹⁰⁹⁰ Pearce, D. The Press Council and Self-regulation.

<http://www.presscouncil.org.au/pcsite/apcnews/nov99/self.html>

¹⁰⁹¹ Bloom-Cooper, L. and Pruitt, L. Privacy Jurisprudence of the Press Complaints Commission. (1994) 23 *Anglo-American L.R.* 133.

¹⁰⁹² Monro, C., Self-regulation in the Media (1997) *PL*, 6.

based on broad public interest in case of intrusion by the press.¹⁰⁹³ In order to protect press freedom, which is the reason for the PCC's existence, the scope of public interest justification may be widened. On the other hand, to adopt a narrow scope of public interest will only affect the press freedom in discharging their function as a public watchdog. In addition, the absence of law on right of privacy may be a reason for the indifferent attitude of the PCC on privacy. The obscurity with regard to the scope of privacy presents a good excuse for the press to indulge in matters that amount to intrusion of privacy.¹⁰⁹⁴ This is likely in the absence of a specific law on right of privacy.¹⁰⁹⁵

Though the PCC possesses the expertise in matters pertaining to the press, its commitment toward protecting personal privacy is unconvincing. The PCC's position on right of privacy is portrayed by Pinker when he emphasises that 'it is worth noting the intrinsically paradoxical nature of privacy as a concept.'¹⁰⁹⁶ This is illustrated in the case of *Anna Ford* and *Sara Cox* when both celebrities took their case to the court against the PCC rulings.¹⁰⁹⁷ Moreover, the press frequently invokes public interest justification under the PCC code of practice particularly with regard to 'preventing the public from being misled by some statement or action of an individual or organization.'

Public figures are most at risk of press harassment and exposure of their private lives. This is so when their public personalities appear to be inconsistent with their private lives. Reliance on such a public interest justification raises a question of the extent of disclosure for the purpose of preventing the public from being misled. Arguably, a broad interpretation would allow the press to intrude and disclose details of private lives that are irrelevant to the misleading statement or action.¹⁰⁹⁸ For instance, the alleged abuse of

¹⁰⁹³ The PCC code of practice 3 (i).

¹⁰⁹⁴ Munro argued that the workability of the concept of privacy and public interest may contribute to the lack of coherence in the Commission's privacy jurisprudence. See Munro, C., *Self-regulation in the Media* (1997) *PL*, 8.

¹⁰⁹⁵ Unlike defamation where there is a clear law prohibiting the press from indulging in defamatory matters.

¹⁰⁹⁶ Pinker, R., *Press Freedom and Press Regulation – Current Trends in their European Context*. (2002) 4 *Comm. L.* 102, 103.

¹⁰⁹⁷ 41% of complainants are not satisfied with PCC rulings. See Kennedy, H. (2004) *Just Law*. Chatto & Windus, 256.

¹⁰⁹⁸ See *Campbell v MGN* [2003] UKHL.

power by the Home Secretary, David Blunkett, does not legitimize the press to expose his personal affairs.

Although the PCC undertakes to handle a complaint in a quick manner but the lack of compensatory justice affect its effectiveness. Moreover, the PCC is not equipped to impose sanction except through publicity. This is in accordance with the PCC requirement that 'any publication which is criticised by the PCC under one of the following clauses is duty bound to print the adjudication which follows in full and with due prominence.' Arguably, the phrase 'with due prominence' is vague, so much so that the press are considered as fulfilling its obligation, though unsatisfactorily, even if the adjudication or apology is printed in a small column in the back page of the publication. This inadequacy is a point of criticism that makes the PCC being described as 'toothless and ineffective'¹⁰⁹⁹ and 'a committee with few teeth'.¹¹⁰⁰ Perhaps the unwillingness of the PCC to impose remedial sanction other than admonition is to maintain the support of the industry for self-regulation. If damage to reputation can be remedied by way of compensation,¹¹⁰¹ it should also be the case for damage to human dignity that is the core value of personhood.¹¹⁰²

The PCC claims that self-regulation is beneficial to ordinary people who could not afford legal action. However, the accessibility of self-regulation by ordinary people who are affected by the conduct of the press to seek justice is questionable. Though the cost involve in pursuing a complaint is 'nothing more than the price of a stamp,'¹¹⁰³ a complainant who chooses to proceed has to take the chance on his own. Usually the press will enjoy the advantage of being represented by a legal team with enormous sources and experience.¹¹⁰⁴ On the other hand, if the complainant decides to employ a legal assistance, he must bear the cost.

¹⁰⁹⁹ Op cit., supra. n.1079, 15.

¹¹⁰⁰ Macdonald, J. and Jones, C. (2003) *The Law of Freedom of Information*. Oxford, 603.

¹¹⁰¹ See per Neill J. in *Rantzen v Mirror Group Newspapers* [1993] 4 All ER 975, 994.

¹¹⁰² Privacy, once lost, can never be restored. Unlike reputation which can be regained after some corrective actions to remedy the damage inflicted.

¹¹⁰³ <http://www.pcc.org.uk/complaint/faq.asp>

¹¹⁰⁴ Coad, J. The Press Complaints Commission – Some Myths about Self-regulation.

<http://www.simkins.co.uk/articles/JKCPressComplaintsCommission.aspx>

The PCC in its 2003 annual report admits that rulings on complaints that were made through solicitors took an average of fifty percent longer to be made and when lawyers become involved in the process it ceases to be particularly fast; and it is, thus, not free.¹¹⁰⁵ Moreover, the press has the advantage of being represented by a legal team in defending their case compared to ordinary individual complainant. In this sense, the PCC does not provide an equal playing field for the purpose of fairness. Therefore, there is a clear disadvantage in the process of pursuing remedy, either at the stage of mediation or adjudication, under self-regulation. Perhaps direct involvement of legal representative in the process is inappropriate for self-regulation that commits to 'fast, free and fair'. Undue delay in handling complaints and additional cost incurred for what supposed to be free are the unbecoming characteristics of self-regulation. In addition, as there is no financial penalty liable to be imposed on the press or award of compensation, the incurred cost is irrecoverable.

The government prolongs the existence of the press self-regulation in the UK when it gives the support to maintain the current system. This is reiterated by the Department of Culture Media and Sport when it expresses the government's unwillingness to introduce any legislation in this area or to interfere with the affairs of the PCC. The stand could be politically motivated as the government may not be willing to create a strained relationship with the press. Otherwise, the government could be seen as restraining the freedom of the press.

7.7 THE PROSPECT OF INDEPENDENT SELF-REGULATION IN MALAYSIA

Malaysia is a democratic country, which exercises a strict regime of regulation on press freedom.¹¹⁰⁶ Although the Federal Constitution guarantees freedom of speech and expression, but the nature of negative right of the freedom allows for certain restrictions on the freedom. The existence of restrictive laws in Malaysia affects freedom of the press at two stages. First, at the formation stage where license is required to operate and print newspapers. Second, the operational stage where the enjoyment of press freedom is

¹¹⁰⁵ Statistics and Analysis, Annual Report 2003. <http://www.pcc.org.uk/2003/statistics.html>

¹¹⁰⁶ Licensing requirement under the Printing Presses and Publication Act 1984 is a form of prior restraint.

limited by other interests as stated by laws. The main legislation regulating the press is the Printing Presses and Publication Act 1984 (PPA).¹¹⁰⁷ The licensing requirement under the PPA is applicable only to print press.¹¹⁰⁸ The Act also empowers the Minister with absolute discretion to revoke any permit.¹¹⁰⁹ Neither can the Minister be accountable to for exercising his power, nor can the court quash his decision.¹¹¹⁰ Therefore, independent self-regulation may not be able to function effectively in defending press freedom with the application of PPA that restricts the freedom.

Furthermore, independent self-regulation may not be able to function properly because of the vast power vested in the executive by the Act. The role of the independent self-regulation cannot supersede the role and function of the Minister under the PPA. Since matters concerning press in Malaysia come under the purview of PPA, the role of self regulation in defending press freedom is confined to the extent permitted by the Act. For instance, section 7 (1) of the PPA grants a power to the Minister to prohibit the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of publication which is prejudicial or likely to be prejudicial to public order, morality, security, public interest or national interest. The interpretation or meaning of the interests such as public order, morality and public interest by the Minister would prevail.¹¹¹¹ This is evident in the case of *Minister of Home Affairs v Aliran*¹¹¹² when the Supreme Court held that the ministerial power under section 12 (2) of the Printing Presses and Publications Act 1984 was not justiciable. Therefore, independent self-regulation must abide by the interpretation of the minister. Consequently, this will diminish the significance of independent self-regulation in forming its own interpretation relating to the interests. In addition, the application of code of practice formulated under self-regulation would be of less significant. This is because the code has no legal binding unless it is incorporated in legislation. However, this is unlikely since the code must also be consistent with the provisions of PPA.

¹¹⁰⁷ Act 301.

¹¹⁰⁸ Section 5 (1) of Printing Presses and Publication Act 1984.

¹¹⁰⁹ Section 6 (1) of Printing Presses and Publication Act 1984.

¹¹¹⁰ Section 13A of Printing Presses and Publication Act 1984.

¹¹¹¹ Section 7 (1) provides that the order to prohibit is based upon the satisfaction of the Minister.

¹¹¹² [1990] 1 MLJ 351.

The advancement in information and communication technology enables an on-line press to be in operation. In Malaysian context, on-line press version does not come under the purview of the PPA because the Act is applicable only to print press. As such, on-line press does not need a license from the government in order to operate. There are independent on-line press that operates on subscription basis such as *Malaysiakini*¹¹¹³ and *Agenda Daily*.¹¹¹⁴ Even though on-line press may allude the PPA but it may not escape the application of other laws such as the Police Act 1967 and Sedition Act 1948.

The implication of classification of press into conventional print press and on-line is that it renders the scope of the PPA in regulating the press limited to the former. As far as the government is concerned independent on-line press are not recognised as accredited press though it receives payment from the public through subscription fee. Lack of government's recognition is a disadvantage to on-line press because they are not given permission to conduct press coverage at government's press conferences and official functions. For instance, the journalists who represent independent on-line press such as *Malaysiakini* are refused press accreditation by the government and received a second-class treatment by not allowing them to make coverage at any government's official function.

Obviously, co-operation and support from the press industry is important in ensuring the success of self-regulation mechanism.¹¹¹⁵ This factor may be difficult to achieve among the press in Malaysia. This is because of the control and ownership of the press by political parties. Nevertheless, co-operation among the mainstream press is possible because of the control by the ruling political party. Such co-operation may not be forthcoming from other licensed periodical such as *Aliran*, which is vocal in its stand against the restriction on press freedom. Undoubtedly, it is difficult to get full support in situation where the mainstream press is criticised of being the mouthpiece of the government and practice imbalance coverage on the oppositions' point of view.

¹¹¹³ <http://www.malaysiakini.com/>

¹¹¹⁴ <http://www.agendadaily.com:8080/cms/index.jsp>

¹¹¹⁵ Pinker. R. Press Freedom and Press Regulation – Current Trends in their European Context. (2002) 7 *Comm. L*, 105.

On the other hand, the existence of several periodicals regarded as the voice of the opposition political parties such as *Harakah* (PAS) and *Rocket* (DAP) may reduce the possibility of getting full co-operation for self-regulation. Although, these periodicals are licensed under the PPA but their publications are not as frequent as the mainstream press. Their objectives and functions are different from that of the mainstream press. They are more politically motivated and focus on building the image and political aspiration of the party they represent. Moreover, their circulation is limited to the members only.

In addition, investigative journalism is actively practiced by the opposition periodicals particularly in disclosing malpractices, abuse of power and corruptions in the government. But the mainstream press less practices this kind of journalism.¹¹¹⁶ By their nature, the political periodicals are critical of the government especially with regard to freedom of expression. The diversity in objective, function and aspiration of the press in Malaysia is a hurdle to the realisation of independent self-regulation. It also negates co-operation that is the thrust in ensuring the success of self-regulation. This is an aspect which distinguish the practice of self-regulation in the UK

On the other hand, co-operation may not be difficult to obtain if the press is confined to the mainstream press. This is because of the common interest and background of the press that are controlled by the ruling party. For instance, such co-operation exists in *BERNAMA*¹¹¹⁷ where six members of the board of governor are also representatives from the mainstream newspapers.¹¹¹⁸ However, to limit the scope of the press in such a way may defeat the purpose of the self-regulation in regulating the press in general regardless of its nature. Moreover, it is in contradiction with the PPA where the Act does not provide for classification or differentiate the nature of the press.

It could be said that the idea of having self-regulation received strong support from the pressure groups particularly those formed by journalists such as Charter 2000 and Centre

¹¹¹⁶ Lent, J. (1982) *Newspapers in Asia: Contemporary Trends and Problems*. Hong Kong, 265.

¹¹¹⁷ The Malaysian news agency, a statutory body set up under the *BERNAMA* Act 1967.

¹¹¹⁸ The representatives are from The New Straits Times/*Berita Harian*, *Utusan Melayu*, The Star, *Sin Chew Jit Poh*, Borneo Post and The New Sabah Times.

http://www.bernama.com/bernama/lembaga_pengelola.html

for Independent Journalism (CIJ).¹¹¹⁹ These groups argue that such mechanism could create a situation whereby the press is free from the government's influence and control. Although the idea is noble but it is rather unconvincing considering the fact that most of the mainstream press are controlled and owned by the ruling political party.

Two local media giants, the New Straits Times Press (NSTP) and Utusan Melayu Berhad, dominate the Malaysian press industry. These corporate organisations have interests in other media related activities such as distribution and broadcasting. Groups closely connected to the ruling political party also control them.¹¹²⁰ It is doubtful if self-regulation can function independently in all aspects when the ruling political party has considerable interests in the matter. Unlike in the UK, though the mainstream press is partisans, which is not unusual, political parties do not own them. This could minimise influence from the government or any political party on the press in discharging their role as the public watchdog. In this respect, the domestic conditions involving the press make independent self-regulation in the UK as tenable. In addition, there is no prior restraint and absolute discretionary power of the executive on press freedom in the UK. These conditions are pre-requisites for self-regulation to function effectively, which are absence in Malaysia.

Furthermore, the appointment of editors in the mainstream press who are closely associated with the ruling party is also a factor against the setting up of self-regulation.¹¹²¹ Self-regulation will lose its integrity if its members are those who represent the government's aspiration. This influence is apparent after the change in the ownership structure of the Malaysian Press with the amendment to the legislation in 1974. The amendment enabled Malaysian citizens to maintain majority shares in all newspapers. With such influence in place, the press is selective in reporting issues of public interest especially on political issues. In relation to this, Lent observes that 'Print media, operating under virtually a guided press concept, stress developmental news

¹¹¹⁹ <http://www.cijmalaysia.org/>

¹¹²⁰ Nain, Z. (1998) *The Structure of the Media Industry: Implications for Democracy*. In Loh, F. and Khoo, T. (eds.) *Democracy in Malaysia: Discourses and Practices*. Richmond, 112.

¹¹²¹ *Ibid*, 130.

through statements made by officials and press releases issued by the Department of Information, press agents of various ministries and *Bernama* News Agency.’¹¹²²

The unique and diverse Malaysian press industry does not provide a common platform for them to consolidate into a hegemonic force to regulate the industry based on self-regulation mechanism. This is unlike in the UK where there is a common platform, which drives the industry to vehemently uphold self-regulation; to avoid statutory regulation. There is an expectation that the exercise of freedom of expression in the UK incorporates the independence of media from the government’s intervention.¹¹²³ Moreover, the looming threat of statutory regulation stimulates the press to ensure that self-regulation works.¹¹²⁴ The commitment of the press to defend self-regulation after being criticised by several reports since the review of press self regulation by Calcutt, is manifested by several changes to the PCC set-up. The changes include the appointment of lay members, amendments to its code of practice and the implementation of the code by way of incorporating it into the contract of employment.

Another point, which is against the formation of independent self-regulation in Malaysia, is the matter of funding. Ideally, an independent source of fund is vital to ensure the credibility of self-regulation. Conversely, self-regulation will be regarded as another layer of control mechanism on press freedom if the government or its agencies are the main source of financial support. To avoid the dubious image, the fund should come from within the industry as exercised by the Press Complaints Commission in the UK. This may prove to be difficult in case of Malaysia. With the oligopoly of press ownership by the ruling party, funding by the industry may not help in portraying an independent self-regulation. In this regard, there is dissimilarity between the two countries as the press in the UK is funded through the levy on the industry. This is made possible through the existence of Press Standards Board of Finance (Presbof), which is committed in maintaining the independence of the Press Complaints Commission.

¹¹²² Lent, J. (1982) *Newspapers in Asia: Contemporary Trends and Problems*. Hong Kong, 265.

¹¹²³ Munro, C. Self-regulation in the Media. (1997) *PL*, 16.

¹¹²⁴ Duty to abide by the code is included in contract of employment.

The opposition to having an independent self-regulation in Malaysia is not because of the resistance of the idea by the journalists but more so by the existence of restrictive law on press freedom and the entrenchment of executive body. The press argues that the existence of restrictive laws would not help in advancing the purpose of self-regulation in defending freedom of the press.¹¹²⁵ The argument seems to focus only on the impact of the formation of the council on the press, whereas in actual fact there is another important aspect of the council, which is to ensure high standard of journalistic ethic in relation with the public. It vindicates the importance of having specific institution to regulate the press in carrying out their duties and obligations.

Thus, the formation of a specific institution such as the press council is relevant in Malaysia to look after the conduct of the press especially in dealing with the public. It is a frivolous argument to oppose the formation of the council on the ground that it is a form of control on press freedom. Self-regulation may not function objectively on the grounds discussed above. Perhaps statutory regulation may offer a viable solution in dealing with the press considering the legal and political environment in Malaysia.

7.8 IS THE PCC MODEL APPROPRIATE?

Freedom of the press represents the core and dynamism of democratic societies. The freedom provides a space wherein only by means of discussion and public participation the government remains responsive to the will of the people. At the same time, the press as a standard vehicle for the dissemination of public opinion helps Parliament to keep its surveillance thereby ensuring the accountability of the executive.

The press, as the eyes and ears of the public,¹¹²⁶ shoulder an onerous responsibility to put forth any unbiased news and information. In order to attain this, the press needs to be free as well as responsible. Thus, a free and responsible press is an asset 'as one of the great bulwarks of liberty.'¹¹²⁷ But sometimes the press is guided by pecuniary interest

¹¹²⁵ Netto, A. An Oppressive Council in the Making? *ALIRAN*.
<http://www.malaysia.net/aliran/monthly/2001/5i.html>

¹¹²⁶ Per Lord Bingham in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 292. See also per Nicholls LJ in *In re C. (Wardship: Treatment) (No. 2)* [1989] 3 WLR 252, 262.

¹¹²⁷ Per Lord Denning in *Schering Chemicals v Falkman Ltd* [1982] QB 1, 17.

rather than public interest. They capitalise sensational issues that interest the public in pursuant of their commercial interest. They take refuge in public interest claiming to justify their pervasive conduct. This type of conduct often makes them vulnerable to legal action such as libel. However, to institute an action in court is costly and can only be done by those who can afford it. Even though there is a legal aid to help low-income people to take actions in courts through legal aid bureau, but it does not cover matters pertaining to civil action such as defamation.

Arguably, there is a need to regulate the conduct of the press. The purpose is not only to ensure that the press act responsibly in exercising their freedom, but also to protect the public from unacceptable conduct such as intrusion of privacy and harassment by the press. Therefore, press freedom should not be used as a shield to protect the press from public grievances. The conducts of the press are sometimes too appalling that it may affect public safety and national security. For example, in the UK, the case of Daily Mirror, which published a faked photograph of abused prisoners by British soldiers, inflicts harm to British forces as well as the general public.¹¹²⁸ In Malaysia, press reporting of a murder case of a young Muslim girl involved in an illicit sexual act that was reported with graphic depiction of the event based on the trial in court, prompted public criticism especially among the Muslims. In another instance, the press was criticised for publishing photograph of young girls in a rape case that is in contradiction with the Child Act 2001. Perhaps such informational communication possesses negligible social utility. Therefore, personal tragedies, such as previously cited, deemed as intolerable by the society should not be within the right to publish or the public right to know. To accept otherwise would immunise the press from liability, which leaves the press free to 'rake up long forgotten personal tragedies for the entertainment of new generations of readers.'¹¹²⁹

Unlike the position in the UK, where the public can voice up their dissatisfactions or even take actions against the press through the PCC, Malaysia does not have the same

¹¹²⁸ Milmo, D. and Carter, H. Mirror editor sacked over hoax. *Media Guardian*, 15 May 2004. <http://media.guardian.co.uk/site/story/0,14173,1217377,00.html>

¹¹²⁹ Lusky, L. Invasion of Privacy: A Clarification of Concepts. (1972) 72 *Col. L.R* 693, 702.

regulatory mechanism. The absence of a specific channel where the public could forward a complaint at times when press conduct is under scrutiny needs to be rectified. As mentioned before, not all members of the public can afford to bring their case for settlement through the courts system because of the cost and lengthy procedure under adversarial system. On the other hand, complaints by a member of the public to the press industry may be futile because of protective attitude in protecting journalists. This is apparent even in situations of grave misconduct on the part of a journalist such as the publishing of a photograph of a young girl in a rape case as reported by the Sun, a local newspaper, in Malaysia. Though the publication is against section 15 of the Child Act 2001 but the press treated it as lapse of journalistic ethic.¹¹³⁰ The question of integrity and credibility of an independent self-regulation in Malaysia as discussed above may pave the way for having statutory regulation. This can be done either through incorporating the regulatory mechanism into an existing framework or by establishing a new specific regulatory body.

The existing mechanism, which may suit the purpose of providing an avenue for the public to voice out their complaints or grievances, is the Human Rights Commission (SUHAKAM). The credential and integrity of SUHAKAM in dealing with issues on human rights may help to garner public confidence. Even though SUHAKAM is a statutory body supported by the government but it is quite vocal and critical of government's policies and conduct pertaining to human rights issue. The government rebuffs SUHAKAM's view on certain human rights issue.¹¹³¹ The critical attitude of SUHAKAM in defending human rights puts the government on a defensive side. For instance, in 2002 SUHAKAM had issued a report on the incident of *KESAS* highway that was critical for the government particularly in relation to the police mishandling of the incident.¹¹³² In addition, SUHAKAM also recommends for the review of restrictive laws such as the ISA. SUHAKAM also supports the idea of having public rallies during

¹¹³⁰ Ooi, J. Protect our children? Certain media don't.

http://www.jeffooi.com/archives/2004/01/protect_our_chi.php

¹¹³¹ Whiting, A. Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission. (2003) 39 *Stan. J Int'l L.* 59.

¹¹³² See Freedom of Assembly, SUHAKAM.

http://www.suhakam.org.my/docs/document_resource/freedom.pdf

election so that political parties can have equal opportunity to present their visions to the public. In reaction to this, the former Prime Minister said that the decision on whether public rallies could be held was not up to SUHAKAM. He sarcastically said that 'For now, it looks like SUHAKAM seems to want to decide on everything.'¹¹³³

Although issues relating to press freedom may well be within SUHAKAM's ambit as it relates to human rights issue, its authority is not wide enough to enable SUHAKAM to function as a regulatory body. There are some constraints for SUHAKAM to become an effective body in dealing with complaints against the press. Thus, amendment to the law is necessary in order to empower SUHAKAM to regulate the press. However, even with the expansion of power, the ability of SUHAKAM to deal with issues relating to privacy remains unclear. The narrow scope of human rights, in particular the absence of right of privacy in the Constitution, will confine the ability of SUHAKAM to deal effectively with intrusion of privacy by the press. Therefore, it is sceptical if SUHAKAM is the appropriate body to deal with issues on privacy in particular and the press in general.

On the other hand, the National Union of Journalists (NUJ), an organisation looking after the well fare of journalists rather than the industry, is not the appropriate body to shoulder the responsibility to regulate the press. Though NUJ has its own code of ethics but the application of the code is confined to the members only. Moreover, it is inconsistent with the objective of NUJ in defending press freedom if it were to have a regulatory function. This is because any form of regulation on the press tantamount to impeding the freedom. In addition, it would be in contradiction with the very existence of the NUJ whose main interest is to protect the journalists whilst at the same time administers restrictions on press freedom.

Alternatively, a specific body responsible for governing the relationship of the press and the public is possible. A press council can play a significant role in preserving the press freedom and improving the standards of the press. There are bodies of similar nature in Malaysia specifically responsible for a particular profession such as the Malaysian Bar Council, a statutory governing body set up under the Legal Profession Act 1976. In

¹¹³³ PM: Decision on rallies not up to Suhakam. *The Star Online*, 4 October 2003.

addition, there are several statutory commissions that exist in Malaysia for specific purposes such as the Malaysian Communications and Multimedia Commission. The commission is a statutory body with powers to supervise and regulate the communications and multimedia activities in Malaysia.¹¹³⁴

In general, objection to statutory regulation is mainly grounded on sceptical perception that regulatory body of this nature functions under the government's influence. It is feared that the body will be used to further restrict freedom of expression and press freedom. Considering the powerful influence of the executive in Malaysia, such fear and skeptical views may have found its basis. However, it may be overcome if statutory body is made accountable to Parliament. By doing so, there is a check and balance to ensure the body's integrity and credibility as its affairs is open to scrutiny. On the other hand, it is argued that the climate of press freedom in Malaysia, where prior restraint and restrictions are imposed, is not conducive for independent self-regulation. This type of regulatory mechanism is feasible in situation where there are no restrictive laws and absolute discretionary power, which empowers the executive to determine matters pertaining to the press.

Although right of privacy is undervalued in Malaysia, it does not mean that the press is free from duties and responsibilities. The situation in Malaysia is that the aggrieved person is unable to seek redress in case of invasion of privacy perpetuated by the press. Unlike the UK, where the law on privacy develops incrementally, privacy in Malaysia as an aspect of human rights issue is still under develop. Privacy may not be a subject of particular concern in Malaysia especially when Malaysia seems to place high regard on communitarian interest rather than stressing on individual right.¹¹³⁵ The decision of the House of Lords in the recent case *Campbell v MGN*¹¹³⁶ may shed some light on the incremental development of the right in the UK. Even though the position in the UK after this particular case is that there is no separate law on privacy, the Campbell's case

¹¹³⁴ See the preamble of the Malaysian Communications and Multimedia Commission Act 1998. Act 589.

¹¹³⁵ Eldridge, P. Human Rights and Democracy in Indonesia and Malaysia: Emerging Contexts and Discourse. (1996) 18 *Contemporary Southeast Asia* 298, 311.

¹¹³⁶ [2004] UKHL 22.

recognised the existence of an aspect of right of privacy surrogating on the law of breach of confidence.

In addition, the significance of right of privacy in the UK is heightened with the introduction of Human Rights Act 1998. Although the Act incorporates the Convention rights but there is still an uncertainty on the horizontal application of right of privacy under Article 8 of the ECHR in the UK. This does not arise in relation to freedom of expression, which is specifically provided, by section 12 of the HRA. Historically, section 12 is included at a later stage after the intervention of the press industry. Right of privacy is unenforceable under the 1998 Act since the right is mainly pertaining to private persons. The provision of public authorities renders the incorporation of the Convention rights applicable vertically. The irony of the situation is that even if a person may not get remedy under the domestic judicial system, the person can bring his case further to regional jurisdiction under the European Court of Human Rights. He may claim his right of privacy under Article 8 of the Convention.

The uncertainty may also be due to the absence of a written constitution that spells out the rights of the people in clear terms. The absence of such a constitutional provision makes Parliament as the supreme authority in legislating laws. The supremacy of Parliament means that the institution can enact any law even if it is against the principles of a democratic society, such as fair trial and justice, like detention without trial under the Anti-Terrorism Crime and Security Act. The courts have no power to annul any law enacted by Parliament. Since the people's representatives make up Parliament, thus it could be said that its law making power is a representation of the interests of the society. However, sometimes the power is influenced by the vested interest of certain quarters such as the press in case of section 12 of the HRA.

Even though Malaysia has a written constitution but there is no specific provision on right of privacy. However, this does not necessarily mean that privacy is not an important concept in Malaysian society. The importance of the right is emphasised elsewhere under other ordinary laws including Islamic law. On the other hand, the development in relation to right of privacy in the UK receives judicial supports to the extent that the right exists in

the form of breach of confidence. Being a common law country that regards the UK courts' decisions as persuasive, Malaysia may refer to the development of right of privacy in the UK as a yardstick to transform its law in the discussed area. Statutory recognition of the right in Malaysia may also take place through the proposed Data Protection Bill. Nevertheless, the law is confined to information privacy, and thus the recognition is not extensive enough to cover the concept of privacy in its wider sense.

Legal action based on right of privacy *per se* is unjusticiable because of lack of legal recognition. However, other privacy related cause of action might be used to pursue legal action in order to enforce privacy interest. Action for trespassing, nuisance, defamation and breach of confidence involve privacy interest but in limited forms. Protection of privacy under these causes of action is, nonetheless, insufficient and inappropriate. Recent development on breach of confidence in the UK's courts provides an avenue for protection of privacy.

However, it is unclear if the courts in Malaysia are willing to follow their counter part in the UK to protect privacy by adopting the equitable doctrine of breach of confidence. There may be a positive prospect for the law to be adopted by the domestic courts considering the close relations of the two judicial systems particularly in relation to legal principles. This is expressed by the High Court in *Teoh Peng Phe v Dato' Seri Dr Ting Chew Peh*¹¹³⁷ where the judge acknowledged the development in English law through the extension of *Norwich Pharmacal*¹¹³⁸ principle by the English Court of Appeal in *Ashworth Hospital*¹¹³⁹ case. The judge found that the application of the principle to 'mere tort' cases following the decision by the Supreme Court in *First Malaysia Finance Bhd v Dato' Mohd Fathi bin Haji Ahmad*¹¹⁴⁰ was mistaken. The judge said that:

But I earnestly and respectfully hope that it would not be long before our Federal Court is presented with the opportunity of reconsidering *First*

¹¹³⁷ [2004] 5 MLJ 241. See also per Gopal Sri Ram CJ in *Attorney General Of Hong Kong v Zauyah Wan Chik & Ors* [1995] 2 MLJ 620, 632.

¹¹³⁸ [1973] 2 All ER 943.

¹¹³⁹ [2001] 1 All ER 991.

¹¹⁴⁰ [1993] 2 MLJ 497.

Malaysia Finance with a view to developing the law on the subject bearing in mind the judgment in *Ashworth Hospital*.¹¹⁴¹

If privacy is to be construed in a wider sense to include right to be let alone, than it is doubtful whether the principles of breach of confidence is extensive enough to serve as a sufficient platform for right of privacy.

In addition, the purposive approach of constitutional interpretation may include privacy under the provision of right to life in Article 5. It is uncertain as to the acceptance of the right within the constitutional framework as there is no specific legal issue on the matter before the courts. Nevertheless, it could be argued on the premise of legal protection on reputational interest and its recognition as a restriction to freedom of expression, it would be untenable to exclude privacy that reflects the value of human dignity, an essence of humanity.

7.9 CONCLUSION

The distinctiveness of Malaysian plural society requires prudent democratic governance. Although the government has managed, thus far, to preserve harmony and tolerance that contribute towards economic prosperity, civil and political rights do not enjoy similar progress. The discourse of fundamental rights is confined within the constitutional framework, which empowers the executive and the legislature to determine the scope of the rights. This is made possible by the constitutional provision of ‘necessity and expedient’ that imbue with relativist expression.

Though it is justifiable to maintain the view that the practice of fundamental rights in accordance with Western liberal philosophy, to a certain extent, is incompatible with the indigenous condition, it is also valid to defend the fact that fundamental rights such as free expression and privacy are precious assets of a democratic society regardless of the geo-political parameters. Arguably, reliance on local distinctiveness and particularities to trump the universality of fundamental rights would not instigate an ambience of a vibrant democratic society. Thus, in pursuing the national aim of becoming a developed

¹¹⁴¹ Ibid, para 20.

democratic state, Malaysia could do better by adopting reflective equilibrium approach. This is an holistic approach in the sense that it takes into account the practice of inalienable fundamental rights in accordance with the nation's aspiration. This is in harmony with the general aim of human rights law, which is to establish practical arrangements in which the interests of all relevant persons are defensibly accommodated.

CHAPTER 8

8.0 INTRODUCTION

In this study, the writer has pondered a tension in Malaysian law between freedom of expression and privacy. The writer has also found in British law, other bodies of law, and academic comment materials and arguments that speak to this tension in potentially constructive ways. At various points in this study, the writer has noted ways in which this tension might be addressed. The most important of these points will be highlighted in this chapter. Finally, some proposals will be made that are intended to provide a basis on which to reform Malaysian law in attractive ways in pursuant to the aim and objectives as stated in chapter 1.

8.1 FOCAL POINTS OF THE STUDY

To recapture the essence of the thesis, the writer will firstly make a brief summary on issues that have been discussed in chapter 2 to chapter 7. Chapter 2 examines the state of freedom of expression in the UK. It reveals that freedom of expression is not an absolute right. Nevertheless, free expression is highly regarded as a fundamental right, intrinsically and instrumentally for the attainment of truth, autonomy or democracy. Before the introduction of the Human Rights Act 1998, freedom of expression is treated as a residual right exercisable as long as there is no legal restraint. The introduction of the Human Rights Act 1998 has incorporated the Convention rights into the UK law. The Act has institutionalised the protection of freedom of expression as a fundamental right. This is strengthened by section 12 of the Act, which requires the courts to give particular regard to the right in granting any relief that might affect freedom of expression. The emphasis on human rights clearly shows that the law in the UK has been responsive to cultural change.

Though freedom of expression is protected as of right, there are exceptions that restrict the right. The exceptions to protect public and private interests such as security and public order for the former, reputation and privacy for the latter create a formidable conflict of interest. A variety of institutional mechanisms has been employed to

accommodate competing interests. This shows the plurality aspect of the UK law that sees some uneasy compromises between competing interests. Nevertheless, the judicial commitment as well as the cultural commitment to freedom of expression is strong. This is so when restrictions are given narrow interpretation and need to be convincingly established. This point then leads to the finding that though freedom of expression is not a primary right but the emphasis on right of freedom of expression makes it more important than privacy. The emphasis in section 12 of the Human Rights Act and section 32 of the Data Protection Act 1998 illustrate the commitment toward freedom of expression and the press. This is substantiated by the refusal of the government to introduce law on privacy until to date.

The strong commitment on freedom of expression is reflected on freedom of the press. The writer finds that the press in the UK exercises more freedom than the press in Malaysia because there is no prior restraint in terms of licensing requirement in the UK. The press in the UK forms a hegemonic force in defending the freedom. Such a force enables them to practice self-regulation, which withstands the threat of replacing the system with statutory regulation. The writer also finds that the present self-regulatory system is suitable in accordance with the local (UK) situations. This is due to the support from the press industries that morally and financially enables the system to function. However, the existing regulatory body, the PCC, is ill equipped in preventing invasive act by the press. Thus, the efficacy and accountability of the system is doubtful. The unwillingness of the press to liberalise its dominance in relation to the code of practice adds to the scepticism on its effectiveness in protecting privacy.

The study continues with Chapter 3, which examines the state of freedom of expression in Malaysia. Freedom of expression is protected as a constitutional right. However, the chapter reveals that the protection accorded to the right is limited. The Constitution empowers Parliament to determine the scope of the right when the latter has the exclusive power to introduce restrictions on freedom of expression. This power emanates from Article 10 (2) (a) of the Constitution when it places the question of necessity and expediency of law in the hand of Parliament. In this regard, the writer finds that even though freedom of expression is recognised as a positive right under the Constitution, but

in practice it is actually a residual right. This is due to the existence of countervailing interests such as security, public order and morality, which are more important than protecting freedom of expression. The application of the doctrine of constitutional supremacy renders the role of the courts to be in accordance with the constitutional provisions. The courts apply strict interpretation of constitutional provision and avoid inquiring into the necessity and expediency of any restrictive law introduced by Parliament. However, judicial activism in this matter helps to protect freedom of expression. This is when the courts can question the nexus between restrictions imposed on the right with the stated interests in the Constitution. The courts have the power to declare that restrictions on freedom of expression are unconstitutional if there is no connection between the restriction and the stated interests.

The writer finds that the doctrine of proportionality is useful in preserving the inviolability of the constitutional right while ensuring that the national and public interest can be safeguarded. The requirement of necessity and pressing needs in a democratic society allow the courts to check the exclusive power of Parliament. In order to achieve this, the writer finds that the courts in Malaysia need to revitalise its approach to establish the sanctity of the institution and its independence. This would be possible through the application of liberal approach in interpreting the constitutional provision. This approach would give expression to fundamental liberties particularly under Part two of the Malaysian Constitution. The approach also would give emphasis on the intrinsic nature of the liberties, such as freedom of expression, as a pre-requisite of vibrant democratic society.

In relation to the freedom of the press in Malaysia, the chapter reveals that the press is heavily regulated. The press in Malaysia is subjected to prior-restraint whereby licensing requirement is a pre-requisite in order for the press to operate. In addition, the writer finds that censorship is prevalent particularly in relation to political expression. This is because political parties control most of the mainstream press. Another finding in relation to the state of press freedom in Malaysia is that a vibrant democracy is difficult to flourish when the freedom is inhibited. Thus, in view of the existence of restrictive laws

on press freedom in Malaysia, the writer finds that there is a need for liberalisation of the press in Malaysia.

In pursuing the main aim of the study, the writer then proceeds to Chapter 4 on the issue of protection of privacy in the UK. Privacy is not an alien concept in the UK. Before the Human Rights Act 1998, privacy had been protected under various privacy related principles such as nuisance, trespass, defamation and breach of confidence. The chapter reveals that there is no free standing law on privacy. It also reveals that protection on privacy is piecemeal and inadequate under the existing legal framework.

The writer finds that there is a state of uncertainty in the UK with regard to the protection of privacy. On one hand, the government is committed in protecting human rights with the introduction of the Human Rights Act 1998. But on the other hand, the inclusion of the Convention rights, which is highly regarded in the ECHR, is not in its totality. The incorporation of the Convention right on privacy does not mean that the UK is obliged to create a specific law to protect the right. Even though privacy is recognised as a fundamental right, its protection is less certain.

The writer also finds that though there is no clear term on its direct horizontal application, there is a possibility for indirect horizontal application. This is possible when the interpretation of public authority is to include the courts. Consequently, it will enable the right of privacy to be enforced under the duty to act compatibly with the Convention rights. The chapter also reveals that there is a development in the UK toward accepting the right. Such development is incrementally taking place by expanding the principles of common law under breach of confidence. However, the writer finds that the limitations of the existing legal framework are unable to cover the issue of privacy satisfactorily. Therefore, a separate cause of action for privacy cases is required. In this regard, the courts play an important role for this particular purpose.

The discussion on right of privacy in chapter 4 serves as guidance for the following discussion in chapter 5. This chapter examines the protection of privacy in Malaysia. It reveals that there is no freestanding law on privacy. There is no clear provision to include

right of privacy as part of the fundamental liberties under the Federal Constitution. The writer further finds that the courts are unable to deliberate on the right of privacy in relation to the Constitution, since the issue has never been raised before them. In addition, the chapter reveals that privacy is not an alien concept in Malaysia. There are legal principles under common law that provide protection to privacy related interests. The writer finds that the application of common law, which is receptive and adaptive toward changes of current social needs, could provide protection to privacy. This is achievable through judicial activism in developing principles following the development on the same issue in the UK. However since there is a possibility of incorporating the right under the constitutional scheme, development of common law principles should only be made in the absence of legislative protection.

In addition, similar protection could also be found in public law. The law acknowledges the right to privacy when it criminalises certain invasive acts. The writer finds that there is a lack of serious commitment on right of privacy as a human right issue in Malaysia. This is attributed primarily to the socio-political priority of the government. The dichotomy of cultural-political rights on one hand, and social-economic rights on the other, contributes to the fact that the main focus on economic matters overwhelms the issue on individual right to privacy. In relation to this, the formation of the Malaysian Human Rights Commission helps to promote the discourse on human rights issue. As a result, there is an increase in awareness over the perception on human rights issues. This is evident from the increase of complaints to the Commission with regards to violation of human rights in Malaysia.

There is also a considerable change of commitment by the government in addressing the issue of human rights. This is marked by the creation of the Commission and the proposed new law on data protection that incorporates protection of informational privacy. The writer finds that the power of the Commission to protect human rights in Malaysia is limited. This is so when the scope of human rights is subjected to fundamental liberties under the Constitution. Nevertheless, there are some progressive developments in relation to human rights in general.

The issue on competing interests as mentioned in the previous chapters is the main thrust of the next chapter. Chapter 6 analyses the accommodating approach to resolve the issue of competing interests. It reveals that the approach to the issue can be categorised into two main categories. First, is balancing-based approach and second, non-balancing exercise. The writer finds that balancing approach is not satisfactory due to the absence of a common scale to weigh the value of two fundamental rights, freedom of expression and privacy. This is so when the Human Rights Act 1998 recognises the importance of both and each serves as an exception to each other. Furthermore, the distortions in balancing exercise would make freedom of expression heavier on the balancing scale. Thus, it acquires a priority treatment, which is against the spirit of equal fundamental right.

The next approach under scrutiny is the doctrine of proportionality. Though it involves balancing exercise, the requirements of necessity and pressing need in a democratic society makes the approach more structured and principled in providing a resolution to the issue of competing interest compared to general balancing approach. The writer also finds that proportionality is appropriate in resolving the issue of competing interests as it is informed by the principle of distributive justice. Human right is about the empowerment of individuals against the governmental authority. But at the same time, the government also needs to protect public interests that sometimes affect individual rights. There are occasions when the state-public relationship requires some drastic measure. For instance, the state needs to regulate the conduct of its subject when the national security or public order is in jeopardy. Making choices between the conflicting incommensurables is justifiable. Thus, it is legitimate to take such measure for the interest of the nation as a whole, since the government in a democratic society is empowered by the people.

The exposition of the issues on freedom of expression and privacy in chapter 2, 3, 4 and 5 builds up the context for the next discussion. Chapter 7 presents a comparative analysis in order to achieve the aim of the study that is to reform and develop law on the press and privacy in Malaysia. The chapter reveals that there are three possible models that can be adopted in the effort to make human rights as prominent in Malaysia. The top-down

model propagates the idea of adherence to universal standards or principles. It overlooks local needs and requirements in pursuing the ideal of unitary justice. On the other hand, bottom-up approach would promote dogmatism whereby any development is dictated by local particularities. It allows the government of the day to capitalise the sentiment of nationalism to hinder foreign elements. Discussion on the models reveals that reflective equilibrium is more attuned to Malaysian climate. The convergence of the universal value of rights and the requirements of local conditions would provide for the pluralistic social practice of human rights at national level. The approach would encourage pragmatism in the process of shaping the domestic legal landscape, attuned to the acceptable universal value.

The argument on local conditions leads to further discussion on the freedom of the press in Malaysia. There is no constitutional guarantee on freedom of the press. The scope of freedom of expression under the Constitution determines the extent of freedom that the press can enjoy. The chapter reveals that political expression is strictly guarded by the application of several restrictive laws. The control exerted on the press is exercised through wide discretionary power of the executive as well as political ownership of the press. This is mainly in relation to the press-state relationship.

Nevertheless, the press enjoys more freedom in commercial and artistic expression than in political expression. As far as the press-people relationship is concerned, there is no specific body legally responsible in regulating the conduct of the press in Malaysia. The writer finds that the existing institutions such as the National Union of Journalists and Malaysian Press Institute could not effectively regulate the conduct of the press due to want of authority. The writer argues that self-regulation is not appropriate under the present circumstances particularly with the existence of the Printing Presses and Publication Act 1984. Alternatively, statutory body is able to command co-operation from the press. The autonomy of the body in setting its goals and functions could garner the support from the press industries as well as the public. Nevertheless, the objective of having a specific regulatory body is futile if the government is insensitive towards reforming the law particularly the PPA.

8.2 RECOMMENDATION AND CONCLUSION

The discourse of rights at the domestic socio-political level is mainly informed by utilitarian impulse. This is so when sacrificing one person's good is permissible in order to maximize the overall good. Although Malaysia affirms its commitment on fundamental rights, which is embedded in the Constitution, the commitment is predicated on the belief that the interest of the society as a whole necessitates restriction on the rights. Universal values under the language of human rights are often being suppressed by a priori of local political and ideological agendas. Undoubtedly, Malaysia has every right to determine her own priorities for the interest of the nation. However, it could arguably be said that emphasis on local particularities as an insulation of acceptable democratic values would preserve dogmatism instead of pragmatism. This is contrary to the Malaysian aspiration of becoming a developed nation among the legion of liberal democratic countries.

This study argues that privacy is an important fundamental right that should be accorded legal protection. There is a need to incorporate the right within the constitutional framework to accord an individual the right to privacy. It would impose positive obligation on the government to ensure that the right is available to every citizen. In order to attain this, the courts need to apply liberal and pragmatic approach in giving expansive interpretation to the existing provision in the Constitution particularly Article 5. This is in line with the spirit of the Constitution to protect fundamental liberties of the citizens.

Undoubtedly, the development of privacy in the UK, which has an inclination toward accepting the right, is relevant in Malaysia. In the absence of a freestanding law on privacy in Malaysia, the writer argues that the courts should refer to the development in the UK on the basis of highly persuasive authority. This is in view of close historical relationship between the two jurisdictions particularly with regard to the common law system. Even though the Malaysian courts are not duty bound to accept the English common law, section 3 of the Civil Law Act 1956 allows the courts to apply the law if the courts deem suitable in accordance with local conditions. In the absence of statutory

provision, the courts can develop the common law to fill the gap. In this regard, the development in the UK could play a role in creating principles at domestic level. The courts in Malaysia can either develop the existing principles such as breach of confidence, modeling on the development in the UK or introduce a new tort law on invasion of privacy as adopted by the USA. As far as the subject of this study is concerned, the invasive act perpetrated by the press, by way of public disclosure of personal information, could satisfactorily be covered under breach of confidence. However, on a broader perspective, the ability of breach of confidence to protect privacy is limited and insufficient. Hence, there is a need for a new law on privacy. The pragmatism of common law would make it an appropriate legal framework for development of principles on privacy to take place incrementally.

8.2.1 SHORT TERM MEASURES

This is in relation to the empowerment of institutional mechanism in dealing with specific matters. The existing institutional bodies such as *SUHAKAM* and *BERNAMA* have their own limitations (as discussed in Chapter 7) that disable them from dealing with issues relating to the press specifically. In this context, the writer supports the establishment of Media or Press Council (the Council) as a specific regulatory body. The proposed Media Council has attracted various reactions. While the proponents defend that the Council can promote and maintain a high standard of journalistic practices, the opponents argue that the existence of the Council does not help in preserving freedom of expression. The ability of the Council to discharge its functions effectively also raises some doubts since there are restrictive laws that affect freedom of the media. The idea of establishing the Council had also received a negative reaction from the press. The press argues that the existence of the Council would further restrict the press freedom in Malaysia. On the contrary, the writer defends the idea of establishing the Council because the independence and autonomous power of the Council would empower the press to set and navigate their own course in accordance with the legal parameter.

In addition to this, the Council would have two objectives. First, in relation to press-state relationship, the Council can help to protect the freedom of speech and the press in its

consultative and supervisory role. Secondly, with regard to press-people relationship, the Council can act as a regulator and mediator to protect privacy. The writer argues that based on the present circumstances,¹¹⁴² the Council should be established in the form of a statutory body. This is to give legal effect to its formation as well as operation. As a statutory body, the Council could play a role in providing protection on privacy through a uniform code of conduct. Adherence to the code is an obligatory requirement. Incorporating the code in the contract of employment can do this. The existing piecemeal code for the press is ineffective and unsatisfactory because of the confinement of its application. Furthermore, the application of the existing code is without legal obligation. In contrast with the practice in the UK, where mainly the press editors construct the code, the preparation of the code in Malaysia should include people outside the industry. This is to maintain the integrity and credibility of the code especially among the public since the role of the Council is not limited to upholding the freedom of the press *per se* but encompassing the right of others as well.

The writer would, however, resist the idea of establishing an independent self-regulation modeling on the PCC in the UK. There is a question of integrity in protecting privacy under such a system. Arguably, privacy would be a peripheral issue under an organisation that exists mainly to defend the countervailing interest, freedom of the press. Moreover, the domination and influence of the press in such an organisation would create an element of bias and discrimination. In addition, there is lack of accountability under such a system in case of failure to give equal emphasis on protection of privacy.

Alternatively, Malaysia could adopt a co-regulation system. In contrast with self-regulation, this system combines the interested parties under one functioning organisation. There are several positive aspects of co-regulation. This system would enable the combination of several aspects such as expertise and interest. The system encourages a wider commitment to protect both free speech and privacy. Co-regulation could exist under the existing framework. This could be done through changes in the *modus operandi* of SUHAKAM. Although SUHAKAM has created a Working

¹¹⁴² For instance, the dominance of ethnic-based political party and the unwillingness of the government to relax restrictive provisions in the Printing Presses and Publication Act 1986.

Committee to look into matters relating to press freedom and privacy, the effectiveness of the Committee is questionable. This is because the composition of the Committee does not involve the press. Thus, the Committee could be extended to include the press so that the latter can make contribution in designing a system that affects their interest.

Besides the short term measures, the writer also proposes a long-term measure in pursuing the central theme of the study relating to protection of privacy.

8.2.2 LONG TERM MEASURES

The study establishes that the existence of restrictive laws affect the freedom of the press in Malaysia. Thus, development in this area, which in the opinion of the writer is long overdue, should be on evolutionary basis rather than revolution. This is in view of the fact that the government is not willing to abolish the licensing system. Instead of arguing for deregulation, the writer argues that regulation on the press is necessary.

Although the writer agrees that the press needs freedom to function effectively in a democratic society, it is unreasonable to allow unregulated press considering the plurality of values in Malaysia. Due to this fact, therefore, the Malaysian constitutional commitment to freedom of speech needs liberal and pragmatic approach. In order for this to be effective, the judiciary must play its role as an independent institution through judicial activism. It requires the courts to apply liberal and purposive approach in upholding the right to freedom of speech and expression. On one hand, the liberal approach in this context is to give extensive meaning and latitude to the exercise of the right and thus upholds the supremacy of the Constitution. On the other, pragmatic approach gives expression to the needs that are necessary in a democratic society whilst taking into account the particularities of the society.

Based on this premise, it is part of the thematic argument throughout the study that reflective equilibrium-based approach should be the guiding principle. This approach would enable the development of fundamental rights discourse at domestic level to flourish by taking into account the universality of fundamental rights such as free speech

and privacy. At the same time, the approach could avoid a crude transplantation of foreign principles by maintaining the suitability of the principles within local framework. Besides the role of the judiciary, the legislature also has a direct influence in the reformation process. Part of the reformation to liberalise the press is to amend both the licensing requirement and discretionary power of the executive in the PPA. The writer argues vehemently against the practice of prior-restraint. Arguably, it is difficult to rely on antithetical views about the indigenous conditions to legitimise prior-restraint. Moreover, prior-restraint does not reflect the constitutional commitment to freedom of speech and the practice of democratic values.

However, contrary to the call for abolishing licensing requirement, the writer argues for relaxation of the requirement. Instead of making it as an imperative requirement, it should be made available upon application for administrative purposes. In addition, absolute discretionary power of the executive in the issuance of license should be abolished. Nevertheless, the power of revocation should be maintained but not on the basis of absolute discretionary power.

In view of the development at domestic level, the writer argues that there is a prospect for reflective equilibrium to be exercised base on judicial activism and pragmatism. This is justifiable from the judicial commitment of the Court of Appeal (COA) in *Lim Teck Kong v Dr. Abdul Hamid Abdul Rashid*.¹¹⁴³ The COA decided to depart from the House of Lords' decisions regarding right to award damages on pure economic loss. The COA said:

We have been too long in the shadow of the House of Lords' decisions of *Murphy* and *D & F Estates*. We are of the view that it is time for us to move out of the shadow and move along with other Commonwealth countries where damages could be awarded on pure economic loss.

Though a long historical relationship exist, legal or non-legal, between Malaysia and the UK, the above case envisages that the Malaysian judiciary acts independently in developing Malaysian common law principle. The case shows the maturity of the courts in establishing domestic legal principles. On this premise, the writer argues that reflective

¹¹⁴³ <http://www.kehakiman.gov.my/jugdment/coa/archive/B-02-757-98.htm>

equilibrium is in practice. The above case also vindicate that local conditions and particularities serve as insulations in determining the applicability of a well-established principle deemed to be incongruent with the domestic set up.

The exercise of reflective equilibrium can also be discerned through the judicial activism portrayed by the Court of Appeal in the case of *Kerajaan Negeri Selangor v Sagong Bin Tasi & Ors.*¹¹⁴⁴ This case involved the right of aboriginal people over land. The COA's decision has been heralded as a landmark decision because of the pragmatic approach and the willingness of the COA to apply an expansive construction in favour of the aborigines in enhancing their rights rather than curtailing them.¹¹⁴⁵ The COA explains that '...ordinarily we, the judges, are not permitted by our own jurisprudence, to do this. But here you have a direction by the supreme law of the Federation that such modifications as the present must be done. That is why we can resort to this extraordinary method of interpretation'.¹¹⁴⁶ In this case, the COA recognised the right of the aboriginal people over land and the right to receive adequate compensation for the acquisition of their land.

Drawing on the current judicial commitment in dealing with the fundamental rights issues by employing liberal and expansive interpretation of constitutional provisions, the writer believes that similar treatment would be extended in protecting right to privacy within the ambit of the constitutional right to life. The writer realises that judicial commitment in this regard could only be exercised if the individual's level of awareness towards their civil and political rights is high. At present, such awareness continues to develop. This is based on the existence of organisations such as the Human Rights Commission, several human rights based NGOs and institutions such as the parliamentary Human Rights Caucus. In addition, the media also contributes towards increasing the awareness by highlighting news on infringement of human rights. As far as the courts are concerned, they can only deliberate on the issue of privacy if they are presented with the opportunity. Unfortunately, the courts are being deprived from such an opportunity when issues on privacy are eclipsed by other causes of action.

¹¹⁴⁴ [2005] 6 MLJ 289.

¹¹⁴⁵ <http://www.malaysianbar.org.my/content/view/2423/2/>

¹¹⁴⁶ *Supra*, 310.

At this juncture, based on the judicial commitment, the role of the media and the political will of the ruling government, the writer is of the view that protection of fundamental rights in Malaysia, is moving incrementally towards a right-based approach informed by communitarian impulse. If the current development on fundamental rights is moving progressively, the writer believes that by the year 2020, Malaysians could enjoy protection of their inalienable rights. However, the protection is not akin to the practice in the West, which is on the basis of strong individual right-based approach, because Malaysia subscribes to multiculturalism that gives emphasis to local condition.

This study contributes to the on-going debate on freedom of the press and right of privacy in Malaysia. As far as Malaysia is concerned, the study defends the idea for liberalisation of the press instead of indigenisation. It extends the argument for reformation at the policymaking level as well as at the application level. The analysis conducted in this study particularly in relation to the competing interests involving free expression and privacy could help the relevant parties for instance, the government agencies, NGOs and the press in Malaysia to assess the issue of privacy in making judgment for future actions. In relation to the right of privacy in Malaysia, this study makes an inroad on the issue. As far as the writer is aware, this study is the first to examine the right of privacy in Malaysia comparatively. It discusses the possibility of the inclusion of privacy within the constitutional framework, which is the stand of the writer, by way of expansive interpretation of the current provision. It also examines the inadequate and piecemeal protection of privacy in Malaysia. Deliberations on this subject could have a springboard effect in view of the development of human rights awareness at the national level. One of the foreseeable effects is the increase of awareness on the need to make right of privacy as a fundamental issue. Unfortunately, hitherto the issue of privacy as a fundamental individual right in Malaysia is still underdeveloped. Thus, the study has set the foundation by examining the state of privacy in Malaysia and proposing several recommendations.

For future study on privacy in Malaysia, issue such as the appropriateness of law on privacy by way of statute or common law should be considered in relation to the local particularities. However, considering the fact that Malaysia gives more emphasis on

social and economic interests than on civil and political interests, it is most unlikely for the introduction of statutory law on privacy. Thus, the courts would be the potential institution to develop the law.

The writer realises that restriction on freedom of the press would be less forbidding to investors used to press freedom, particularly in media sector. This could affect economic development. Nevertheless, the writer argues that such effect is minimal since economic development in Malaysia as a whole depends on trade and commercial activities. Even with the current restrictions on press freedom, Malaysia manages to increase her bilateral trade with the United States of America and the European Union¹¹⁴⁷, despite the fact that the US and EU adopt more liberal approach towards press freedom. Perhaps the ability of the ruling government in maintaining political stability could be one of the core factors in attracting investors.

Moreover, restriction on freedom of the press in Malaysia relates more on political information rather than commercial. Arguably, the press enjoy more freedom in commercial expression compared to political expression. Although Malaysia upholds human rights and fundamental freedoms, emphasis is given on the satisfaction of basic human needs and conditions created for the realisation and fulfillment of the needs.¹¹⁴⁸ Nevertheless, the writer argues that as Malaysian society develop progressively towards vision 2020, the commitment to protect fundamental freedoms and to satisfy basic human needs should be exercised in parallel. This is in tandem with the aim to become a developed society.

It is hoped that this study would pave the way for future researchers to focus on the issue as to whether the law should be of multifactorial or a solitary tort on privacy. The writer would also like to suggest that a future study on this subject matter should cover the scope and the impact of on-line press and its regulations on the right to privacy.

¹¹⁴⁷ www.aseanindia.net/asean/countryprofiles/malaysia/trade-policy.htm

¹¹⁴⁸ <http://www.kln.gov.my/english/Fr-foreignaffairs.htm>

BIBLIOGRAPHY

BOOKS

- Abas, S. and Das, K. (1989) *May Day for Justice: The Lord President's Version*. Kuala Lumpur, Magnus Book.
- Alder, J. (1999) *Constitutional and Administrative Law*. Houndmills, MacMillan Press Ltd.
- Allan, T. R. S. (2000) *Common Law Constitutionalism and Freedom of Speech*. In Beatson, J. and Cripps, Y. (eds.) *Freedom of Expression and Freedom of Information*. Oxford, Oxford University Press.
- Bailey, S.H. et al (1991) *Civil Liberties: Cases and Materials*. London, Butterworth.
- Baker, J.H. and Milsom, S.F.C. (1990) *Sources of English Legal History*. London, Butterworths.
- Bakshi, P. M. (1986) *Press Law: An Introduction*. New Delhi, TFR Institute for Social Sciences Research and Education.
- Barendt, E. (1993) *Media Law*. Aldershot, Dartmouth Publishing Ltd.
- Barendt, E. and Firth, A. (eds.) (2002) *The Yearbook of Copyright and Media Law 2001/2*. Oxford, Oxford University Press.
- Barendt, E. (ed.) (2001) *Privacy*. Aldershot, Dartmouth Publishing Ltd.
- Barendt, E. and Hitchens, L. (2000) *Media Law: Cases and Materials*. Harlow, Longman.
- Barent, E. et al (1997) *Libel and the Media*. Oxford, Clarendon Press.
- Barry, B. (1965) *Political Argument*. London, Routledge & Kegan Paul.
- Bauer, J. and Bell, D. (eds.) (1999) *The East Asian Challenge for Human Rights*. Cambridge, Cambridge University Press.
- Beatson, J. and Cripps, Y. (2000) *Freedom of Expression and Freedom of Information*. Oxford, Oxford University Press.
- Beer, L. W. (1984) *Freedom of Expression in Japan: A Study in Comparative Law, Politics, and Society*. Tokyo, Kodansha International.
- Berlin, I. (1969) *Four Essays on Liberty*. London, Oxford University Press.
- Birks, P. (1997) *Privacy and Loyalty*. Oxford, Clarendon Press.
- Bradley, A. W. and Ewing, K. D. (1997) *Constitutional and Administrative Law*. 12th ed. London, Longman.
- Calcutt, D. (1993) *Review of Press Self-Regulation*. London, Stationary Office.
- Campbell, T. and Goldberg, D. (1986) *Human Rights: From Rhetoric to Reality*. London, Blackwell.
- Campbell, T. and Sadurski, W. (eds.) (1994) *Freedom of Communication*. Aldershot, Dartmouth Publishing.
- Chang, R. (1997) *Incommensurability, Incompatibility and Practical Reason*. Cambridge, Harvard University Press.
- Clapham, A. (2002) *Human Rights in the Private Sphere*. Oxford, Clarendon Press.
- Clayton, R. (2000) *The Law of Human Rights*. Oxford, Oxford University Press.
- Clayton, R. and Tomlinson, H. (2002) *Privacy and Freedom of Expression*. Oxford, Oxford University Press.

- Colvin, M. (ed.) (2002) *Developing Key Privacy Rights*. Oxford, Hart Publishing.
- Criag, P. (2003) *Administrative Law*. London, Sweet and Maxwell.
- Curran, J. and Seaton, J. (1991) *Power without Responsibility: The Press and Broadcasting in Britain*. London, Routledge.
- Curran, J. (1998) *Newspapers and the Press*. In Briggs, A. and Cobley, P. (eds.) *The Media: An Introduction*. Harlow, Longman.
- Deakin, S. et al (2003) *Tort Law*. Oxford, Oxford University Press.
- Dicey, A.V. (1959) *Introduction to the study of the law of Constitution*. London, Macmillan.
- Dworkin, R. (1976) *Taking Rights Seriously*. London, Butterworth.
- Dworkin, R. (1988) *A Bill of Rights for Britain?* London, Chatto.
- Dworkin, R. (1996) *Freedom's Law, The Moral Reading of the American Constitution*. Oxford, Oxford University Press.
- Dworkin, R. (2002) *Sovereign Virtue: The Theory and Practice of Equality*. Cambridge, Havard University Press.
- Feinberg, J. (1984) *Harm to Others*. Oxford, Oxford University Press.
- Feinberg, J. (1985) *Offense to Others: The Moral Limits of the Criminal Law*. Oxford, Oxford University Press.
- Feldman, D. (2002) *Civil Liberties and Human Rights in England and Wales*. 2nd ed. Oxford, Clarendon Press.
- Fenwick, H. (2002) *Civil Liberties and Human Rights*. London, Cavendish.
- Freeman, M. (ed.) (1999) *Current Legal Problems 1998: Legal Theory at the End of the Millennium*. Oxford, Oxford University Press.
- Friedmann, D and Erez, D. B. (eds.) (2001) *Human Rights in Private Law*. Oxford, Hart Publishing.
- Ghandhi, P. R. (1995) *International Human Rights Documents*. 2nd ed. London, Blackstone Press.
- Gibbons, T. (1998) *Regulating the Media*. London, Sweet and Maxwell.
- Gibbons, T. (2002) *Reforming the Regulation of Communication*. In Barendt, E. et al. (eds.) *The Year Book of Copyright and Media Law*. Oxford, Oxford University Press.
- Gray, J. (1993) *Post-Liberalism*. New York, Routledge.
- Gray, J. (1998) *John Stuart Mill On Liberty and Other Essays*. Oxford, Oxford University Press.
- Grosz, S. et al (2000) *Human Rights: The 1998 Act and the European Convention*. London, Sweet Maxwell.
- Habermas, J. (1996) *Between Facts and Norms*. Cambridge, MIT Press.
- Halsbury's Laws of England, 4th ed. vol. 8(2). London, Butterworth.
- Halsbury's Laws of Malaysia (2000) vol.2. Kuala Lumpur, Malayan Law Journal.
- Harding, A. (1996) *Law, Government and the Constitution in Malaysia*. London, Kluwer International.
- Hare, I. (2000) *Is the Privileged Position of Political Expression Justified?* In Beatson, J. and Cripps, Y. (eds.) *Freedom of Expression and Freedom of Information*. Oxford, Oxford University Press.
- Harris, et al (1995) *Law of the European Convention on Human Rights*. London, Butterworth.

- Hoggart, R. (1957) *The Uses of Literacy*. London, Chatto & Windus.
- Holland, J. A. and Webb, J. S. (1991) *Learning Legal Rules*. London, Blackstone Press.
- Ibrahim, A. (ed.) (1980) *Survey of Malaysian Law 1978*. Kuala Lumpur, Malayan Law Journal.
- Ibrahim, A. and Joned, A. (1995) *The Malaysian Legal System*. Kuala Lumpur, Dewan Bahasa dan Pustaka.
- Inness, J. (1992) *Privacy, Intimacy and Isolation*. Oxford, Oxford University Press.
- Janis, M. W. et al (2000) *European Human Rights Law: Text and Materials*. Oxford, Clarendon Press.
- Jewa, T. K. (1996) *Public International Law: A Malaysian Perspective*. Kuala Lumpur, Pacifica Publication.
- Jones, B. (ed.) (1990) *Political issues in Britain Today*. Manchester, Manchester University Press.
- Jones, G. (ed.) (1973) *The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Laws of England*. London, MacMillan.
- Kamali, M. H. (1998) *Freedom of Expression in Islam*. Kuala Lumpur, Ilmiah Publishers.
- Kaufman, G. (2003) *Privacy and Media Intrusion*. Fifth Report. London, Stationary Office Ltd.
- Kennedy, H. (2004) *Just Law*. London, Chatto & Windus.
- Kersch, K. I. (2003) *Freedom of Speech: Rights and Liberties under the Law*. Santa Barbara, ABC-Clio.
- Kymlicka, W. (1997) *Contemporary Political Philosophy, An Introduction*. Oxford, Clarendon Press.
- Langlois, A. J. (2001) *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory*. Cambridge, Cambridge University Press.
- Lee, H. P. (1995) *Constitutional Conflicts in Contemporary Malaysia*. Kuala Lumpur, Oxford University Press.
- Lent, J. (1982) *Newspapers in Asia: Contemporary Trends and Problems*. Hong Kong, Heinemann
- Littman, M. and Carter-Ruck, P. (1970) *A Report by Justice: Privacy and the Law*. London, Stevens & Sons Limited.
- Loh, F. (2002) *Developmentalism and the limits of Democratic Discourse*. Richmond, Curzon Press.
- Loh, F. and Khoo, B. T. (1998) *Democracy in Malaysia: Discourses and Practices*. Richmond, Curzon Press.
- Lord Irvine (2003) *Human Rights, Constitutional Law and the Development of the English Legal System*. Oxford, Hart Publishing.
- Lord Lester. (1997) *Constitutional Law and Human Rights*. London, Butterworth.
- Lord Lester and Pannick, D. (1999) *Human Rights and Practice*. London, Butterworth
- Lord Lester and Oliver, D. (1997) *Constitutional Law and Human Rights*. London, Butterworth.
- MacDonald, B. and Petheram, M. (1998) *Media Ethics*. London, Mansell Publishing.
- MacDonald, J. and Jones, C. (2003) *The Law of Freedom of Information*. Oxford, Oxford University Press.
- Manning, M. (1983) *Rights, Freedom and the Courts: A Practical Analysis of the Constitution Act 1982*. Toronto, Emond-Montgomery Ltd.

- McCrudden, C. and Chambers, G. (eds.) (1994) *Individual Rights and the Law in Britain*. London.
- Michael, J. (1994) *Privacy and Human Rights*. Aldershot, Dartmouth Publishing.
- Milmo, P. et al (2004) *Gatley on Libel and Slander*. 10th ed. London, Sweet & Maxwell.
- Moore, B. (1984) *Privacy: Studies in Social and Cultural History*. New York, M.E Sharpe.
- Munir, A. B. and Yasin, S. H. (2002) *Privacy and Data Protection: A Comparative Analysis with Special Reference to the Malaysian Proposed Law*. Selangor, Sweet & Maxwell.
- Muzaffar, C. (2002) *Rights, Religion and Reform*. London, RoutledgeCurzon.
- Nicol, A. et al (2001) *Media Law and Human Rights*. London, Blackstone Press.
- Omar, I. (1996) *Rights, Emergencies and Judicial Review*. London, Kluwer International.
- Rachagan, S. and Tikamdas, R. (eds.) (1999) *Human Rights and the National Commission*. Kuala Lumpur, HAKAM.
- Rawls, J. (1970) *A Theory of Justice*. Oxford, Clarendon Press.
- Raz, J. (1986) *The Morality of Freedom*. Oxford, Clarendon Press.
- Robertson, G. (1983) *People against the Press*. London, Quartet Books.
- Robertson, G. and Nicol, A. (2002) *Media Law*. 4th ed. London, Sweet & Maxwell.
- Robilliard, J. A. (1984) *Religion and the Law*. Manchester, Manchester University Press.
- Rozenberg, J. (2004) *Privacy and the Press*. Oxford, Oxford University Press.
- Schauer, F. (1994) *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives*. Rosenfeld, Duke University Press.
- Schoeman, F. (1992) *Privacy and Social Freedom*. Cambridge, Cambridge University Press.
- Sheridan, L. A. (1961) *Malaya and Singapore the Borneo Territories: The Development of their Laws and Constitutions*. London, Steven & Sons Ltd.
- Sheridan, L. A. and Groves, H. E. (1979) *The Constitution of Malaysia*. 3rd ed. Singapore, Malayan Law Journal.
- Shorts, E. (1998) *Civil Liberties Legal Principles of Individual Freedom*. London, Sweet and Maxwell.
- Shorts, E. (2001) *Human Rights Law in the UK*. London, Sweet and Maxwell.
- Lim, K. S. et al (1985?) *Human Rights in Malaysia*. Petaling Jaya, DAP Human Rights Committee.
- Simpson, A. W. B. (2001) *Human Rights and the End of Empire*. Oxford, Oxford University Press.
- Steiner, H. J. and Alston, P. (2000). *International Human Rights in Context: Law Politics Morals*. Oxford, Oxford University Press.
- Suffian, H. (1988) *An Introduction to the Legal System of Malaysia*. Petaling Jaya, Fajar Bakti.
- Tan, K. et al (1994) *Constitutional Law in Malaysia and Singapore*. Singapore, Malayan Law Journal.
- Tomlinson, H. (2002) *Privacy and the Media*. Oxford, Oxford University Press.
- Toulson, R. G. and Phipps, C. M. (1996) *Confidentiality*. London, Sweet & Maxwell.
- Tugendhat, M. and Christie, I. (2002) *The Law of Privacy and Media*. Oxford, Oxford University Press.
- Wacks, R. (1993) *Privacy*. Aldershot, Dartmouth.

- Wacks, R. (1995) *Privacy and Press Freedom*. London, Blackstone Press Ltd.
- Wadham, J. et al (2003) *Blackstone's Guide to the Human Rights Act 1998*. Oxford, Oxford University Press.
- Wade, H. and Forsyth, C. (2004) *Administrative Law*. Oxford, Oxford University Press
- Waldron, J. (ed.) (1984) *Theories of Rights*. Oxford, Oxford University Press.
- Waluchow, W. J. (ed.) (1994) *Free Expression: Essays in Law and Philosophy*. Oxford, Clarendon Press.
- Walzer, M. (1994) *Thick and Thin: Moral Argument at Home and Abroad*. Notre Dame, University of Notre Dame Press.
- Westin, A. (1970) *Privacy and Freedom*. London, The Bodley Head Ltd.
- Whitty, N. et al (2001) *Civil Liberties: The Human Rights Act Era*. London, Butterworth.
- Wright, J. (2001) *Tort Law and Human Rights*. Oxford, Hart Publishing.
- Wu, M. A. (1978) *An Introduction to the Malaysian Legal System*. Kuala Lumpur, Heinemann.
- Yatim, R. (1995) *Executive Power in Malaysia*. Kuala Lumpur. Endowment Publication
- Younger, K. (1972) *Report of the Committee on Privacy*. London, HMSO
- Zweigert, K. and Kotz, H. (1998) *Introduction to Comparative Law*. Translated by Weir, T. Oxford, Clarendon Press.

ARTICLES

- Abraham, C. Freedom of Speech for Whom? The Malaysian Case. (1998) 27 *INSAF* 1.
- Addruse, A. *Fundamental Rights and the Rule of Law: Their Protection by Judges*. Paper presented at 12th Commonwealth Law Conference, 13 September 1999. Kuala Lumpur, Malaysia.
- Alder, J. Incommensurable Values and Judicial Review: The case of local government. (2001) *Public Law* 717.
- Aleinikoff, T. A. Constitutional Law in the Age of Balancing. (1987) 96 *Yale Law Journal* 943.
- Alexy, R. Constitutional Rights, Balancing and Rationality. (2003) 16 *Ratio Juris* 131.
- Ali, A.R. NUJ dan Kebebasan Akhbar. (1987) 8 *SASARAN* 16.
- Amos, M. Can We Speak Freely Now? Freedom of Expression under the Human Rights Act. (2002) 6 *European Human Rights Law Review* 750.
- Azmi, I. E-Commerce and Privacy Issues: An Analysis of the Personal Data Protection Bill. (2002) 16 *International Review of Law Computers & Technology* 317.
- Bakar, O. Asian Values or Universal Values Championed by Asia? Implications for East-West Understanding. (1998) 8 (2) *Social Semiotics* 169.
- Bari, A. Freedom of Speech and Expression in Malaysia. (1998) 28 *INSAF* 149.
- Bari, A. Teaching Constitutional Law in Malaysia: An Appraisal. (1999) 1 *Malayan Law Journal* clxii.
- Bari, A. (2004) The Evolution of Malaysian Constitutional Tradition. Paper presented at the *Asian Law Institute Inaugural Conference* organized Asian Law Institute (ASLI), Singapore on 27-28 May 2004.
- Bezanson, R. The Right to Privacy Revisited: Privacy, News and Social Change 1890-1990. (1992) 80 *California Law Review* 1133.

- Bingham, T. Should There Be a Law to Protect Rights of Personal Privacy. (1996) 5 *European Human Rights Law Review* 455.
- Blake, N. Importing Proportionality: Clarification or Confusion. (2002) 1 *European Human Rights Law Review* 19.
- Bloom-Cooper, L. and Pruitt, L. Privacy Jurisprudence of the Press Complaints Commission. (1994) 23 *Anglo-American Law Review* 133.
- Bloustein, E. Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser. (1964) 39 *New York University Law Review* 962.
- Brown, S. Public Interest Immunity. (1994) *Public Law* 579
- Buxton, R. The Human Rights Act and Private Law. (2000) 116 *Legal Quarterly Review* 46.
- Chai, L. K. Mykad: Invasion of Privacy. (2003) 32(3) *INSAF* 91.
- Chemerinsky, E. Balancing the Rights of Privacy and the Press: A Reply to Professor Smolla. (1999) 67 *George Washington Law Review* 1152.
- Clarke, L. Privacy, Breach of Confidence and the Press: Where Are We Now? (2002) 7 *Communications Law* 78.
- Craig, J. and Nolte, N. Privacy and Free Speech in Germany and Canada: Lessons for an English Privacy Tort. (1998) 2 *European Human Rights Law Review* 162.
- Cram, I. Minor's Privacy, Free Speech and the Courts. (1997) *Public Law* 410.
- DeCew, J. W. The Scope of Privacy in Law and Ethics. (1986) 5 *Law and Philosophy* 145.
- Dolding, L. and Mullender, R. Tort Law, Incrementalism, and the House of Lords. (1996) 47 *Northern Ireland Law Quarterly* 12.
- Dworkin, G. Privacy and the Press. (1961) 24 *Modern Law Review* 185.
- Eady, D. A Statutory Right to Privacy. (1996) 3 *European Human Rights Law Review* 243.
- Eldridge, P. Human Rights and Democracy in Indonesia and Malaysia: Emerging Contexts and Discourse. (1996) 18 *Contemporary Southeast Asia* 298.
- Faruqi, S. Free Speech and the Constitution. (1992) 4 *Current Law Journal* 34.
- Faruqi, S. (1994) *A Comparative Constitutional Approach to Human Rights*. Paper presented at *Bengkel Human Rights: An Inventory of Propositions*, University Kebangsaan Malaysia.
- Faruqi, S. Constitutional Supremacy, Fundamental Rights & Fatwa. (1998) 28 *INSAF* 25.
- Faruqi, S. Human Rights, Globalisation and the Asian Economic Crisis. (1999) 28 *INSAF* 39.
- Feldman, D. Secrecy, Dignity or Autonomy? Views of Privacy as Civil Liberties. (1994) 47 *Current Legal Problem* 42.
- Feldman, D. The Human Rights Act 1998 and Constitutional Principles. (1999) 19(1) *Legal Studies* 165.
- Feldman, D. Human Dignity as a Legal Value- Part II. (2000) *Public Law* 61.
- Fenwick, H. The Right to Protest, the Human Rights Act and the Margin of Appreciation. (1999) 62 *Modern Law Review* 491.
- Fenwick, H. Clashing Rights, the Welfare of the Child and the Human Rights Act. (2004) 67 *Modern Law Review*.
- Fenwick, H. and Phillipson, G. Confidence and Privacy: A Re-Examination. (1996) 55(3) *Cambridge Law Journal* 447.

- Fenwick, H. and Phillipson, G. Breach of Confidence as a Privacy Remedy in the Human Rights Act Era. (2000) 63 *Modern Law Review* 660.
- Galston, W. Value Pluralism and Liberal Political Theory. (1999) 93 *The American Political Science Review* 769.
- Galston, W. Who's a Liberal? (2001) *The Public Interest*
- Gavinson, R. Privacy and the Limits of Law. (1980) 89 *Yale Law Journal* 420.
- Gibbons, T. Freedom of the Press: Ownership and Editorial Values. (1996) *Public Law* 279.
- Giminez, E. J. Who Watches the Watchdogs? The Status of Newsgathering Torts Against the Media in Light of the Food Lion Reversal. (2001) 52 *Alabama Law Review* 675.
- Glenn, P. Are Legal Traditions Incommensurable? (2001) 49 *American Journal of Comparative Law* 133.
- Gomez, J. Contempt of Court- Freedom of Expression and the Rights of the Accused. (2002) 3 *Malayan LawJournal (A)* 241.
- Greenawalt, K. Free Speech Justifications. (1989) 89(1) *Columbia Law Review* 119.
- Greer, S. Constitutionalizing Adjudication under the European Convention on Human Rights. (2003) 23 *Oxford Journal of Legal Studies* 405.
- Hare, I. Verticality Challenged: Private Parties, Privacy and the Human Rights Act. (2001) 5 *European Human Rights Law Review* 526.
- Hartman, C. J. The Emergence of a Statutory Right to Privacy Tort in England. (1995) *Media Law & Practice* 16.
- Hasian, M. Vernacular Legal Discourse: Revisiting the Public Acceptance of the "Right to Privacy" in the 1960s. (2001) 18 *Political Communication* 89.
- Henkin, L. Infallibility under Law: Constitutional Balancing (1978) 78 *Columbia Law Review* 1022.
- Hirsch, A.V. Injury and Exasperation: An Examination of Harm to Others and Offense to Others. (1986) 84 *Michigan Law Review* 700.
- Hirsleifer, J. Privacy, Its Origin, Function and Future. (1980) 9 *Journal of Legal Studies* 649.
- Hoffmann, L. Human Rights and the House of Lords. (1999) 62 *Modern Law Review* 159.
- Hunt, M. The Horizontal Effect of the Human Rights Act. (1998) *Public Law* 423.
- Jain, M. P. and Xavier, G. Compulsory Acquisition of Land in Malaysia (Pt I) (1996) 2 *Malayan Law Journal(A)* 29.
- Jain, M. P. Role of the Judiciary in a Democracy. (1979) *Journal of Malaysian and Comparative Law* 239.
- Jones, J. Common Constitutional Traditions: Can the Meaning of Human Dignity Under German Law Guide the European Court of Justice. (2004) *Public Law* 167.
- Kahn-Freund, O. On Uses and Misuses of Comparative Law. (1974) 37 *Modern Law Review* 1.
- Kearns, P. Obscene and Blasphemous Libel: Misunderstanding Art. (2000) 15 *Criminal Law Review* 652.
- Kennedy, D. The International Human Rights Movement: Part of the Problem? (2002) 15 *Harvard Human Rights Journal* 101.
- Laws, J. The Limitations of Human Rights. (1998) *Public Law* 254.

- Leigh, I. Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg. (2002) *Public Law* 265.
- Lenaerts, K. Fundamental Rights in the European Union. (2000) 25 *European Law Review* 574.
- Lester, A. The Human Rights Act 1998-Five Years On. (2004) 3 *European Human Rights Law Review* 259.
- Lester, L. and Dawn, O. Private Lives and Public Figures: Freedom of Political Speech in a Democratic Society. (1999) 4(2) *Communications Law* 43.
- Loon, N. Emergence of a Right to Privacy from within the Law of Confidence. (1996) 18 *European Intellectual Property Review* 307.
- Loveland, I. A Sign of Things to Come? The ECHR and a 'Public/Private' Divide in the Civil Law of Defamation. (1996) 1(5) *Communications Law* 193.
- Lusky, L. Invasion of Privacy: A Clarification of Concepts. (1972) 72 *Columbia Law Review* 693.
- Markesinis, B. Our Patchy Law of Privacy- Time to Do Something About It. (1990) 53 *Modern Law Review* 802.
- Markesinis, B. Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany. (1999) *Law Quarterly Review* 115.
- Markesinis, B. et al. Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help). (2004) 52 *American Journal of Comparative Law* 133.
- Marshall, G. Press Freedom and Free Speech Theory. (1994) *Public Law* 40.
- McHarg, A. Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights. (1999) 62 *Modern Law Review* 671.
- Morgan, J. Privacy, Confidence and Horizontal Effect: "Hello" Trouble. (2003) 62(2) *Cambridge Law Journal* 444.
- Mullender, R. Privacy in New Zealand: Are There Lessons to be Learned? (1994) *Cambridge Law Journal* 11.
- Mullender, R. Privacy, Paedophilia and the European Convention on Human Rights: A Deontological Approach. (1998) *Public Law* 384.
- Mullender, R. Parliamentary Supremacy, the Constitution and the Judiciary. (1998) 49(2) *Northern Ireland Law Quarterly* 138.
- Mullender, R. Theorizing the Third Way: Qualified Consequentialism, the Proportionality Principle, and the New Social Democracy. (2000) 27 *Journal of Law and Society* 493.
- Mullender, R. Human Rights: Universalism and Cultural Relativism. (2003a) 6 *Critical Review of International Social and Political Philosophy* 70.
- Mullender, R. Tort, Human Rights, and Common Law Culture. (2003b) 23 *Oxford Journal of Legal Studies* 301.
- Munro, C. Press Freedom- How the Beast Was Tamed. (1991) 54 *Modern Law Review* 104.
- Munro, C. Self-Regulation in the Media. (1997) *Public Law* 6.
- Munro, C. The Value of Commercial Speech. (2003) 62 *Cambridge Law Journal* 134.
- Neill, B. The Protection of Privacy. (1962) 25 *Modern Law Review* 393.
- Nijar, G. S. Democracy and the Rule of Law in Malaysia. (1994) 23 *INSAF* 3.

- Nowlin, C. The Protection of Moral under the European Convention for the Protection of Human Rights and Fundamental Freedoms. (2002) 24 *Human Rights Quarterly* 264.
- Oliver, D. The Human Rights Act and Public Law/Private Law Divides. (2000) 4 *European Human Rights Law Review* 343.
- Parent, W. Privacy, Morality and the Law. (1983) *Philosophy and Public Affairs* 269.
- Parent, W. A. A New Definition of Privacy for the Law. (1983) 2 *Law and Philosophy* 305.
- Paton-Simpson, E. Private Circles and Public Squares: Invasion of Privacy by the Publication of 'Private Facts'. (1998) 61 *Modern Law Review* 318.
- Phillipson, G. and Fenwick, H. Breach of Confidence as a Privacy Remedy in the Human Rights Act Era. (2000) 63 *Modern Law Review* 660.
- Phillipson, G. The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper? (1999) 62 *Modern Law Review* 824.
- Phillipson, G. Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act. (2003) 66 *Modern Law Review* 27.
- Phillipson, G. and Fenwick, H. Confidence and Privacy: A Re-Examination. (1996) *Cambridge Law Journal* 447.
- Phillipson, G. and Fenwick, H. Public Protest, the Human Rights Act and Judicial Responses to Political Expression. (2000) *Public Law* 627.
- Pinker, R. Press Freedom and Press Regulation – Current Trends in Their European Contact. (2002) 4 *Communication Law* 102
- Post, R. C. The Social Foundation of Privacy: Community and Self in the Common Law Tort. (1989) 77 *California Law Review* 957.
- Pound, R. A Survey of Social Interests. (1943) 57 *Harvard Law Review* 1.
- Prosser, W. Privacy. (1960) 48 *California Law Review* 383.
- Raphael, T. The Problem of Horizontal Effect. (2000) 5 *European Human Rights Law Review* 493.
- Raz, J. Free Expression and Personal Identification. (1991) 2 *Oxford Journal of Legal Studies* 303.
- Reitz, J.C. How to Do Comparative Law. (1998) 46 *American Journal of Comparative Law* 617.
- Rogers, H. and Tomlinson, H. Privacy and Expression: Convention Rights and Interim Injunctions. (2003) *European Human Rights Law Review* (Special Issue) 37.
- Rubinstein, J. Calcutt Down Size : Is Privacy a Dead Letter. (1993) 4(2) *Entertainment Law Review* 31.
- Sacco, R. Legal Formants: A Dynamic Approach to Comparative Law. (1991) 39 *American Journal of Comparative Law* 1.
- Sara, I. The Right of Privacy Is Coming to the UK: Balancing the Individual's Right to Privacy from the Press. (1999) 21 *Houston Journal of International Law* 531.
- Scanlon, T. A Theory of Freedom of Expression. (1972) 1 *Philosophy And Public Affairs* 204.
- Scanlon, T.M. Freedom of Expression and Categories of Expression. (1979) 40 *University of Pittsburgh Law Review* 519.
- Schilling, K. Privacy and the Press: Breach of Confidence- The Nemesis of the Tabloids. (1991) 2 (6) *Entertainment Law Review* 169.

- Schilling, K. Freedom of Expression in the UK: Illusion or Reality. (1993) 4(3) *Entertainment Law Review* 87.
- Schwartz, J. Relativism, Reflective Equilibrium, and Justice. (1997) *Legal Studies* 128.
- Scruton, P. et al. Freedom and Regulation. (1998) 3(5) *Communications Law* 176.
- Seipp, D.J. English Judicial Recognition of a Right to Privacy. (1983) 3 *Oxford Journal of Legal Studies* 325.
- Sing, R. and Strachan, J., The Right to Privacy in English Law. (2002) 2 *European Human Rights Law Review* 129.
- Singh, R. Privacy and the Media after the Human Rights Act. (1998) 6 *European Human Rights Law Review* 712.
- Smith, A. The Press, the Courts and the Constitution. (1999) 52 *Current Legal Problem* 126.
- Soper, P. Searching for Positivism. (1996) 94 *Michigan Law Review* 1739.
- Starmer, K. Two Years of the Human Rights Act. (2003) 1 *European Human Rights Law Review* 14.
- Steiner, H. The Structure of a Set of Compossible Rights. (1996) *Journal of Philosophy* 767.
- Sunstein, C. Incommensurability and Valuation in Law. (1994) 92 *Michigan Law Review* 779.
- Taylor, G. D. S. Privacy and the Public. (1971) 34 *Modern Law Review* 288.
- Taylor, N. Policing, Privacy and Proportionality. (2003) *European Human Rights Law Review*
- Thomson, J. The Right to Privacy. (1975) 4 *Philosophy & Public Affairs* 295.
- Thomson, M. Privacy before and after the Human Rights Act. (2001) 6(6) *Communications Law* 180.
- Tierney, S. Press Freedom and Public Interest: The Developing Jurisprudence of the European Court of Human Rights. (1998) 4 *European Human Rights Law Review* 419.
- Tomlinson, H. and Rogers, H., Privacy injunctions: Reviewing the Approach. (2003) 153 *New Law Journal* 818.
- Unknown author. Anonymity, Confidentiality and Freedom of Expression. (2002) 7(2) *Communications Law* 62.
- Verschraegen, G. Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory. (2002) 29(2) *Journal of Law and Society* 258.
- Wacks, R. The Poverty of Privacy. (1980) 96 *Law Quarterly Review* 73.
- Wade, H. Horizons of Horizontality. (2000) 116 *Law Quarterly Review* 217.
- Warren, S.D and Brandeis, L.D. The Right to Privacy. (1890) 4 *Harvard Law Review* 193.
- Whiting, A., Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission. (2003) 39 *Stanford Journal of International Law* 59.
- Wilson, W. Privacy, Confidence and Press Freedom: A Study in Judicial Activism. (1990) 53 *Modern Law Review* 43.
- Winfield. Privacy. (1931) 47 *Law Quarterly Review* 23.
- Young, A.L. Remedial and Substantive horizontality: The Common Law and *Douglas v Hello! Ltd.* (2002) *Public Law* 232.

Yusuf, A. (1987) *Freedom of the Press in Malaysia*. Paper presented at 10th LAWASIA Conference. Kuala Lumpur.

ARTICLE IN AN INTERNET.

- Abdullah, M. D. National Security Considerations under the ISA 1960 – Recent Development. *Malayan Law Journal*.
<http://www.mlj.com.my/free/dzaidin.htm> (Retrieved June 20, 2004)
- Cloonan, M. Regulating the Press: The Calcutt Reports. University of York.
<http://www.york.ac.uk/depts/poli/currentug/syh/cs012.yrk> (Accessed July 20, 2003)
- Coad, J. The Press Complaints Commission – Some Myths about Self-Regulation.
<http://www.simkins.co.uk/articles/JKCPressComplaintsCommission.aspx>
(Accessed October 15, 2003)
- Dato' Seri Abdullah Badawi, Human Rights and Good Governance. Opening Address at the Malaysian Human Rights Day 2004 Conference.
http://www.suhakam.org.my/en/press_room/details.asp?id=163 (Accessed May 10, 2004)
- Gopal Sri Ram, Independence of Judiciary and Judicial Accountability.
<http://www.clea.org.uk/clea/paper4.htm> (Accessed July 20, 2003)
- Hashim, H. Freedom of Speech, Communication and the Press. (2003) *Malayan Law Journal*.
<http://www.mlj.com.my/free/articles/harunhashim.htm> (Retrieved June 10, 2004)
- Hasim, M. S. (1993?). The Indigenization of the Press in Malaysia: From Adversary to Partnership.
http://www.orbicom.uqam.ca/in_focus/publications/archives/hasim.html
(Retrieved July 20, 2003)
- Hector, C. Mahathir and the judges: The Judiciary during the Mahathir Era. *Aliran Monthly* 2003:8.
<http://www.aliran.com> (Accessed July 20, 2003)
- Idid, S. A. Free Speech and the Constitution- With Special Reference to the Media. *Malayan Law Journal*.
<http://www.mlj.com.my/free/articles/syed-idid3.htm> (Retrieved October 20, 2004)
- Lord Bingham of Cornhill. The Way We Live Now: Human Rights in the New Millennium. (1998) 1 *Web Journal of Current Legal Issues*.
<http://webjcli.ncl.ac.uk/1998/issue1/bingham1.html> (Retrieved July 12, 2002)
- Lord Woolf CJ. (2003) *Solemn Hearing of the European Court of Human Rights*.
<http://www.echr.coe.int/eng/Speeches/Speechby.htm> (Retrieved January 5, 2004)
- Ministry of Energy, Water and Communications, Personal Data Protection.
<http://www.ktkm.gov.my/template01.asp?> (Accessed January 11, 2003)
- Nash, C. Freedom of the Press in Australia.
<http://democratic.audit.am.edu.au/nashpaper.pdf> (Retrieved July 10, 2004)
- Navaratnam, R. Economic, Social and Cultural Rights- Accessibility to Basic Needs. *SUHAKAM*.
http://www.suhakam.org.my/docs/press_room/Speech310703.pdf (Accessed October 5, 2003)

- Netto, A. Op-press-ive council in the making. *Aliran*.
<http://www.malaysia.net/aliran/monthly/2001/5i.html> (Accessed February 2, 2002)
- Ong, A. Lapse in journalistic ethics in NST, Star draws flak. *Malaysiakini*, 26 January 2004.
<http://www.malaysiakini.com/news/2004012600113808.php> (Accessed January 28, 2004)
- Pearce, D. The Press Council and Self-regulation.
<http://www.presscouncil.org.au/pcsite/apcnews/nov99/self.html> (Retrieved October 15, 2003)
- Ram, G. S. Human Rights: Incorporating International Law into the Present System. *Malayan Law Journal*.
<http://www.mlj.com.my/free/articles/gopalsriram.html> (Retrieved October 20, 2004)
- Sarwar, M. National Security & Fundamental Liberties: Are the Courts Striking the Right Balance? *Malayan Law Journal*.
<http://www.mlj.com.my/free/articles/malik&chris.htm> (Retrieved October 20, 2004)
- Shankar, M. Freedom of Expression: Its Extent and Limits and the Problems it Encounters. *Malayan Law Journal*.
<http://www.mlj.com.my/free/articles.htm> (Retrieved October 20, 2004)
- Sundram, J. (2001) Malaysia's New Economic Policy and 'National Unity'. Switzerland, *United Nations Research Institute for Social Development*.
- Unknown author, Malaysian pupils strip-searched in satanic cult crackdown.
http://www.ananova.com/news/story/sm_362924.html (Accessed January 28, 2004)
- Webb, P. Analysis of Data Protection Laws in Australia and Germany. (2003) 2 *Journal Of Information Law and Technology*.
<http://elj.warwick.ac.uk/jilt/03-2/webb.html> (Retrieved May 15, 2004)
- Zainol, Z. A. Electronic Commerce: A Comparative Analysis of the Malaysia Digital Signature Act 1997 and the Singapore Electronic Transaction Act 1998. Paper presented at 15th BILETA Conference. University of Warwick, England.
<http://www.bileta.ac.uk/00papers/zainol/html> (Retrieved October 6, 2002)